LLEN PARK PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF BERKLEY, BRANDON SCHOOLS, CENTERLINE PUBLIC SCHOOLS, CHERRY HILL SCHOOL DISTRICT, CHIPPEWA VALLEY PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF CLAWSON, CRESTWOOD SCHOOL DISTRICT, DEARBORN PUBLIC SCHOOLS, DEARBORN HEIGHTS SCHOOL DISTRICT NO. 7, EAST DETROIT PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF FERNDALE, FLAT ROCK COMMUNITY SCHOOLS, GARDEN CITY PUBLIC SCHOOLS, GIBRALTAR SCHOOL DISTRICT, SCHOOL DISTRICT OF THE CITY OF HARPER WOODS, SCHOOL DISTRICT OF THE CITY OF HAZEL PARK, INTERMEDIATE SCHOOL DISTRICT OF THE COUNTY OF MACOMB, LAKE SHORE PUBLIC SCHOOLS, LAKEVIEW PUBLIC SCHOOLS, THE LAMPHERE SCHOOLS, LINCOLN PARK PUBLIC SCHOOLS, MADISON DISTRICT PUBLIC SCHOOLS, MELVINDALE-NORTH ALLEN PARK SCHOOL DISTRICT, SCHOOL DISTRICT OF NORTH DEARBORN HEIGHTS, NOVI COMMUNITY SCHOOL DISTRICT, OAK PARK SCHOOL DISTRICT, OXFORD AREA COMMUNITY SCHOOLS, REDFORD UNION SCHOOL DISTRICT NO. 1, RICHMOND COMMUNITY SCHOOLS, SCHOOL DISTRICT OF THE CITY OF RIVER ROUGH, RIVERVIEW COMMUNITY SCHOOL DISTRICT, ROSEVILLE PUBLIC SCHOOLS, SOUTH LAKE SCHOOLS, TAYLOR SCHOOL DISTRICT, WARREN CONSOLIDATED SCHOOLS, WARREN WOODS PUBLIC SCHOOLS, WAYNE-WESTLAND COMMUNITY SCHOOLS, WOODHAVEN SCHOOL DISTRICT, and WYANDOTTE PUBLIC SCHOOLS; SOUTHFIELD PUBLIC SCHOOLS; and SCHOOL DISTRICT OF THE CITY OF ROYAL OAK,

Petitioners,

vs.

ONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; WILLIAM G. MILLIKEN, Governor of the State of Michigan and ex-officio member of the Michigan State Board of Education; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate, and JOHN W. PORTER, Superintendent of Public Instruction, Department of Education of the State of Michigan; ALLISON GREEN, Treasurer of the State of Michigan; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; DENISE MAGDOWSKI and DAVID MAGDOWSKI, by their Mother and Next Friend, JOYCE MAGDOWSKI; DAVID VIETTI, by his Mother and Next Friend, VIOLET VIETTI, and the CITIZENS COMMITTEE FOR BETTER EDUCATION OF THE DETROIT METROPOLITAN AREA, a Michigan non-profit Corporation; KERRY GREEN and COLLEEN GREEN, by their Father and Next Friend, DONALD G. GREEN, JAMES, JACK and KATHLEEN ROSEMARY, by their Mother and Next Friend, EVELYN G. ROSEMARY, TERRI DORAN, by her Mother and Next Friend, [illegible]LY DORAN, SHERRILL, KEITH, JEFFREY and GREGORY COULS, by

(Continued on Reverse Side)

their Mother and Next Friend, SHARON COULS, EDWARD and MICHAEL ROMESBURG, by their Father and Next Friend, EDWARD M. ROMESBURG, Jr., TRACEY and GREGORY ARLEDGE, by their Mother and Next Friend, AILEEN ARLEDGE, SHERYL and RUSSELL PAUL by their Mother and Next Friend, MARY LOU PAUL, TRACY QUIGLEY, by her Mother and Next Friend, JANICE QUIGLEY, IAN, STEPHANIE, KARL AND JAKOO SUNI, by their Mother and Next Friend, SHIRLEY SUNI; and TRI-COUNTY CITIZENS FOR INTERVENTION IN FEDERAL SCHOOL ACTION NO. 35257; MICHIGAN EDUCATION ASSOCIATION; PROFESSIONAL PERSONNEL OF VAN DYKE, and THE GROSSE POINTE PUBLIC SCHOOLS,

Respondents

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,

Petitioner,

vs.

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools; WILLIAM G. MILLIKEN, Governor of the State of Michigan and ex-officio member of the Michigan State Board of Education; FRANK J. KELLY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate, and JOHN W. PORTER, Superintendent of Public Instruction, Department of Education of the State of Michigan, ALLISON GREEN, State Treasurer; ALLEN PARK PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF BERKLEY, BRANDON SCHOOLS, CENTERLINE PUBLIC SCHOOLS, CHERRY HILL SCHOOL DISTRICT, CHIPPEWA VALLEY PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF CLAWSON, CRESTWOOD SCHOOL DISTRICT, DEARBORN PUBLIC SCHOOLS, DEARBORN HEIGHTS SCHOOL DISTRICT NO. 7, EAST DETROIT PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF FERNDALE, FLAT ROCK COMMUNITY SCHOOLS, GARDEN CITY PUBLIC SCHOOLS, GIBRALTAR SCHOOL DISTRICT, SCHOOL DISTRICT OF THE CITY OF HARPER WOODS, SCHOOL DISTRICT OF THE CITY OF HAZEL PARK, INTERMEDIATE SCHOOL DISTRICT OF THE COUNTY OF MACOMB, LAKE SHORE PUBLIC SCHOOLS, LAKEVIEW PUBLIC SCHOOLS, THE LAMPHERE SCHOOLS, LINCOLN PARK PUBLIC SCHOOLS, MADISON DISTRICT PUBLIC SCHOOLS, MELVINDALE-NORTH ALLEN PARK SCHOOL DISTRICT, SCHOOL DISTRICT OF NORTH DEARBORN HEIGHTS, NOVI COMMUNITY SCHOOL DISTRICT, OAK PARK SCHOOL DISTRICT, OXFORD AREA COMMUNITY SCHOOLS, REDFORD UNION SCHOOL DISTRICT NO. 1, RICHMOND COMMUNITY SCHOOLS, SCHOOL DISTRICT OF THE CITY OF RIVER ROUGE, RIVERVIEW COMMUNITY SCHOOL DISTRICT, ROSEVILLE PUBLIC SCHOOLS, SOUTH LAKE SCHOOLS, TAYLOR SCHOOL DISTRICT, WARREN CONSOLIDATED SCHOOLS, WARREN WOODS PUBLIC SCHOOLS, WAYNE-WESTLAND COMMUNITY SCHOOLS, WOODHAVEN SCHOOL DISTRICT and WYANDOTTE PUBLIC SCHOOLS; KERRY and COLLEEN GREEN, by their Father and Next Friend, DONALD G. GREEN; JAMES, JACK and KATHLEEN ROSEMARY, by their Mother and Next Friend, EVELYN G.

(Continued on Reverse Side)

ROSEMARY; TERRI DORAN, Mother and Next Friend, BEVERLY DORAN; SHERRILL, KEITH, JEFFREY and GREGORY COULS, by their Mother and Next Friend, SHARON COULS; EDWARD and MICHAEL ROMESBURG, by their Father and Next Friend, EDWARD M. ROMESBURG, JR.; TRACEY and GREGORY ARLEDGE, by their Mother and Next Friend, AILEEN ARLEDGE; SHERYL and RUSSELL PAUL, by their Mother and Next Friend, MARY LOU PAUL; TRACY QUIGLEY, by her Mother and Next Friend, JANICE QUIGLEY; IAN, STEPHANIE, KARL and JAAKO SUNI, by their Mother and Next Friend, SHIRLEY SUNI; and TRI-COUNTY CITIZENS FOR INTERVENTION IN FEDERAL SCHOOL ACTION NO. 35257; DENISE MAGDOWSKI and DAVID MAGDOWSKI, by their Mother and Next Friend, JOYCE MAGDOWSKI; DAVID VIETTI, by his Mother and Next Friend, VIOLET VIETTI; and the CITIZENS COMMITTEE FOR BETTER EDUCATION OF THE DETROIT METROPOLITAN AREA, a Michigan non-Profit Corporation; SCHOOL DISTRICT OF THE CITY OF ROYAL OAK; SOUTHFIELD PUBLIC SCHOOLS,

Respondents

INDEX

	PAGE
Introductory Prayer	1
Opinions and Orders Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions, Statutes and Rules Involved	4
Statement of the Case	5
Summary of the Argument	11
Reasons for Denying the Writs	13
1. Certiorari should be denied as this is not an appeal from a final decision since the Sixth Circuit has remanded the case to the district court to determine what type of remedy should be ordered, and what districts, if any, should be included in that remedy.	13
2. Certiorari should be denied because this Honorable Court cannot properly assess the propriety of a multi-district remedy when all factual aspects of the remedy are hypothetical and speculative and their impact, if any, upon each Petitioner is unknown at this time.	17
3. The metropolitan desegregation remedy ordered by the courts below is based on specific Michigan public school law, set in the context of the relevant metropolitan Detroit community, and thus certiorari should be denied.	19
4. Certiorari should be denied as the courts below did not err in ordering a metropolitan remedy, without regard to artificial city or boundary lines, to eliminate unconstitutional, racially identifiable schools in the metropolitan Detroit community, since the State of Michigan, in and of itself, has sole responsibility for education within its boundaries.	27
5. Since this Honorable Court has encouraged district courts to fashion broad, tailor-made, equitable remedies for the elimination of constitutional violations in each	

PAGE

given situation, there is nothing unconstitutional in the instant remedy, pursuant to established Michigan public school law, so as to justify certiorari. 40

6. The courts below found systematic acts of segregation affecting the constitutional rights of black children for which the State Defendants are responsible. 47

7. The Petitioner school districts have not been denied due process of law since they are agencies of the State Board of Education which has been a party to this litigation from its inception, and which has adequately protected the interests of the Petitioner school districts. 53

Conclusion 55

Appendix 1a

TABLE OF AUTHORITIES

PAGE

American Construction Company v. *Jacksonville T & K.W.R. Company*, 148 U.S. 372 (1893) 13

Attorney General, ex rel Kies v. *Lowrey*, 131 Mich. 639 (1902), *aff'd*, 199 U.S. 233 (1905) 19

Baker v. *Carr*, 369 U.S. 186 (1962) 36

Bradley et al. v. *Milliken et al.*, 433 F2d 897 (6th Cir., 1971) . 2, 7

Bradley et al. v. *Milliken et al.*, 438 F2d 945 (6th Cir., 1971) . 2, 7

Bradley et al. v. *Milliken et al.*, 468 F2d 902 (6th Cir., 1972), *cert. denied*, 409 U.S. 874 (1972) 2

Bradley v. *Milliken*, Nos. 72-1809-1814 (6th Cir., June 12, 1973) 54

Bradley v. *School Board of the City of Richmond*, 51 F.R.D. 139 (D.C. Va. 1970) 53

Bradley v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir., 1972), *aff'd*, ___ U.S. ___, 93 S.Ct. 1952 (1973) 26, 42

Brotherhood of Locomotive Firemen and Enginemen v. *Bangor & Aroostook R. Co.*, 389 U.S. 327 (1967). 14

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954) 28, 31

Brown v. *Board of Education of Topeka*, 349 U.S. 294 (1955) 17, 31, 45

Burleson v. *County Board of Election Commissioners of Jefferson County*, 308 F.Supp. 352 (E.D. Ark. 1970), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970) 41

Catlin v. *U.S.*, 324 U.S. 229 (1945) 13

Clark v. *Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970) 35

Cooper v. *Aaron, 358 U.S. 1 (1958)* 50

Davis v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971) 33, 34, 40

Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) 14

PAGE

Gillespie v. *U.S. Steel Corporation*, 379 U.S. 148 (1964). ... 14

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 54

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 36, 40

Goss v. *Board of Education of the City of Knoxville*, Civil Nos. 72-1766-1767 (6th Cir. July 18, 1973) 43

Green v. *County School Board of New Kent County*, 391 U.S. 430 (1968) 17, 36

Griffin v. *School Board of Prince Edward County*, 377 U.S. 218 (1964) 51

Hall v. *St. Helena Parish School Board*, 197 F.Supp. 649 (E.D. La. 1961), aff'd, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962) 41

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 204 U.S. 251 (1916) 14

Haney v. *County Board of Education of Sevier County*, 410 F.2d 920 (8th Cir. 1969) 41

Hatton v. *County Board of Education of Maury County*, 422 F.2d 457 (6th Cir. 1970) 54

Higgins v. *Board of Education, City of Grand Rapids*, No. 6386 (D.C. W.D. Mich., July 18, 1973) 53

Isdaner v. *Beyer*, 53 F.R.D. 4 (D.C. Pa. 1971) 53

Jenkins v. *Township of Morris School District*, 58 N.J. 483, 279 A.2d 619 (1971) 43

Kelley v. *Metropolitan County Board of Education of Nashville and Davidson County*, 463 F.2d 732 (1972), *cert. denied*, 409 U.S. 1001 (1972) 33

Keyes v. *School District No. 1, Denver*, ___U.S.___, 37 L.Ed. 2d 548 (1973) 47, 48, 49, 50

Lee v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971) 40

Lemon v. *Bossier Parish School Board*, 446 F.2d 911 (5th Cir. 1971) 33

Lindsey v. *Normet*, 405 U.S. 56 (1972) 54

Louisiana v. *United States*, 380 U.S. 145 (1965) 35

Morgan v. *Thompson*, 124 F. 203 (8th Cir. 1903) 13

PAGE

Northcross v. *Board of Education of Memphis*, 420 F.2d 546 (1969), *aff'd per curiam*, 397 U.S. 232 (1970) 28

Owenby v. *Morgan*, 256 U.S. 94 (1921) 54

Raney v. *Board of Education of Gould School District*, 391 U.S. 443 (1968) 28

Reynolds v. *Sims*, 377 U.S. 533 (1964) 40

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 50

Spencer v. *Kugler*, 326 F.Supp. 1235(D. N.J. 1971), *aff'd*, 404 U.S. 1027 (1972) 43

St. Louis, I.M. and S.R.R. v. *Southern Express Company*, 108 U.S. 24 (1883) 13

Swann v. *Charlotte-Mecklenburg Board of Education*, 318 F.Supp. 786 (W.D. N.C. 1970) 51

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 11, 17, 27, 28, 33, 34, 35, 44, 45

Taylor v. *Board of Education of New Rochelle*, 288 F.2d 600 (1961) 14

Turner v. *Warren County Board of Education*, 313 F.Supp. 380 (E.D. N.C. 1970) 41

United States v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972) 28, 41

United States v. *State of Texas*, 447 F.2d 441 (5th Cir. 1971) 41

Wright v. *Council of City of Emporia*, 407 U.S. 451 (1972)28, 41

U.S. Const. amend. XI 4, 50, 51, 1aa

U.S. Const. amend. XIV 4, 35, 42, 51, 1aa

U.S. Const. amend. XV 4, 35, 1aa

Michigan Const. art. VIII, §2 ..... 4, 6, 1aa

Judicial Code, 28 U.S.C. §1292(b) 4, 9, 2aa

Act 48, Sec. 12, Mich. Pub. Acts of 1970 ..... 4, 7, 48, 2aa

Fed. R. Civ. P.19 ..... 4, 53, 3aa

Fed. R. Civ. P.24(a)(2) 4, 54, 4aa

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-434
No. 73-435
No. 73-436

WILLIAM G. MILLIKEN, et al.,

Petitioners,

-vs-

RONALD BRADLEY, et al.,

Respondents.

ALLEN PARK PUBLIC SCHOOLS, et al.,

Petitioners,

-vs-

RONALD BRADLEY, et al.,

Respondents.

GROSSE POINTE PUBLIC SCHOOL SYSTEM,

Petitioner,

-vs-

RONALD BRADLEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents, the Board of Education for the School District of the City of Detroit, a school district of the first class, Patrick McDonald, James Hathaway, Cornelius Golightly and Norman Drachler, respectfully pray that these Petitions for Writs of Certiorari should be denied.

OPINIONS AND ORDERS BELOW

The opinion of the Sixth Circuit, not yet reported, appears in the Appendix, at 110a-240a.[1] Other opinions delivered in the courts below are:

United States District Court for the Eastern District of Michigan, Southern Division

September 27, 1971, Ruling on Issue of Segregation, 338 F.Supp. 582. (17a-39a).

November 5, 1971, Order [for submission of Detroit-only and metropolitan desegregation plan], not reported. (46a-47a).

March 24, 1972, Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, not reported. (48a-52a).

March 28, 1972, Findings of Fact and Conclusions of Law on Detroit-only Plans of Desegregation, not reported. (53a-58a).

June 14, 1972, Ruling on Desegregation Area and Order for Development of Plan, and Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan, 345 F.Supp. 914. (59a-105a).

July 11, 1972, Order for Acquisition of Transportation, not reported. (106a-107a).

United States Court of Appeals for the Sixth Circuit

July 20, 1972 Order [granting leave to appeal], not reported. (108a-109a).

Other opinions of the Sixth Circuit rendered at prior stages of the present proceedings are reported in 433 F.2d 897, 438 F.2d 945 and 468 F.2d 902, *cert. den.*, 409 U.S. 844 (1972).

---

[1] Hereinafter references to the Petitioners' Appendix already filed herein will be indicated by page numbers enclosed in parentheses and designated by the letter "a". Appendix references followed by the letters "aa" refer to the Appendix to this Brief commencing at page 1aa hereof.

JURISDICTION

There is no jurisdiction in this Honorable Court because the decision of the district court is not final and is not at an appropriate stage for review.

QUESTIONS PRESENTED

1. Should certiorari be denied since this is not an appeal from a final decision and since the Sixth Circuit has remanded the case to the district court to determine what type of remedy should be ordered, and what districts, if any, should be included in that remedy?

2. Should certiorari be denied because this Honorable Court cannot properly assess the propriety of a multidistrict remedy when all factual aspects of the remedy are hypothetical and speculative and their impact, if any, upon each Petitioner is unknown at this time?

3. Should certiorari be denied where the metropolitan desegregation remedy ordered by the courts below is based on specific Michigan public school law, set in the context of the relevant metropolitan Detroit community?

4. Should certiorari be denied when the courts below did not err in ordering a metropolitan remedy, without regard to artificial city or municipal boundary lines, to eliminate unconstitutional racially identifiable schools in the metropolitan Detroit community, since the State of Michigan, in and of itself, has sole responsibility for education within its boundaries?

5. Should certiorari be denied where this Honorable Court has encouraged district courts to fashion broad, tailor-made, equitable remedies for the elimination of constitutional violations in each given situation, and where there is nothing unconstitutional in the instant remedy, pursuant to established Michigan public school law?

6. Should certiorari be denied where the courts below found systematic acts of segregation affecting the constitutional rights of black children for which the State Defendants are responsible?

7. Should certiorari be denied where the Petitioner school districts have not been denied due process of law since they are agencies of the State Board of Education, which has been a party to this litigation from its inception, and which has adequately protected the interests of the Petitioner school districts?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules relevant to the issues in this case are: U.S. Constitution Amendment XI; U.S. Constitution Amendment XIV; U.S. Constitution Amendment XV; Michigan Constitution Art. VIII, Sec. 2; Judicial Code, 28 U.S.C. §1292(b); Fed. R. Civ. P. 19 and 24(a) (2); and Michigan Public Acts of 1970, Act 48, Sec. 12, which are set forth in relevant part in the Appendix to this Brief in Opposition to Petitions for Writs of Certiorari.

STATEMENT OF THE CASE

The School District of the City of Detroit is one of 85 school districts in the metropolitan Detroit community and one of about 600 school districts in the State of Michigan. Unlike most of the school districts in Michigan, the Detroit School District is coterminous with a political boundary (*i.e.* the city limits of Detroit).[2] At the time the district court rendered its decision on the issue of segregation, September 27, 1971, the Detroit School District serviced some 280,000 school children, 180,000 of whom were black. (20a). This resulted in a school population ratio of approximately 65% black and 35% white, though the City of Detroit itself had a population ratio of 56% white and 44% black. (21a). With some exceptions, the surrounding school districts in the metropolitan Detroit community have overwhelmingly white student populations. (66a).

The City of Detroit is part of the metropolitan Detroit community which is intensely interrelated in terms of social and economic activities. The metropolitan Detroit community is viewed by the United States Census Bureau as a single standard metropolitan statistical area. Metropolitanization has become a growing hallmark of government services in the metropolitan Detroit community. There is a metropolitan transit system (SEMTA), a metropolitan park authority (Huron-Clinton Metropolitan Authority), a metropolitan water system, a metropolitan sewage system and a metropolitan council of governments (SEMCOG). (80a).

---

[2] At least the following Petitioner school districts are not coterminous with political boundary lines of any municipality or county, to wit: Brandon Schools, Cherry Hill School District, Chippewa Valley Public School District, Crestwood School District, Dearborn Heights School District No. 7, Flatrock Community Schools, Lakeshore Public Schools, Lakeview Public Schools, The Lamphere Schools, Melvindale-North Allen Park School District, Allen Park Public Schools, School District of North Dearborn Heights, Oxford Area Community Schools, Redford Union School District No. 1, Richmond Community Schools, South Lake Schools, Warren Consolidated Schools, Warren-Woods Public Schools, Wayne-Westland Community Schools, Grosse Pointe Public Schools.

In the field of education, children in the metropolitan Detroit community have crossed school district lines to attend school or to receive educational services. Some educational services in the metropolitan Detroit community are already provided to students on an inter-district, inter-county, or metropolitan basis by county-wide intermediate school districts and the State Department of Education. (79a). Education in Michigan has been a function of the State since the Northwest Ordinance of 1787 which governed the then Territory of Michigan, (165a). The current Constitution of Michigan, the Constitution of 1963, Article VIII, Section 2, provides in part as follows:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

The Michigan legislature, exercising the aforementioned constitutional mandate, which was also found in Michigan's preceding three constitutions, established numerous school districts. These school districts under Michigan law are creatures of the State of Michigan and act as instrumentalities of the Michigan legislature under the control of the State Board of Education. (167a). School district boundaries in Michigan are not sacrosanct. (167a). This is evidenced by the fact that the State Board of Education had between 1964 and 1968, eliminated 700 school districts. (168a). Since that time the State Board of Education has eliminated additional school districts.

Detroit is located in Wayne County, where a number of school districts have been merged and consolidated by the State Board of Education primarily for financial and educational service reasons. (168a). The pervasiveness of State control over its school districts is further illustrated by the fact that the State provides massive State financing, dictates the number of school days, requires certain courses to be taught, controls the use of particular text books, and imposes many other details of regulatory control. (170a-171a).

On April 7, 1970, the Detroit Board of Education adopted a desegregation plan for its high schools. (17a). However, before the Detroit Board of Education could implement its April 7, 1970 desegregation plan, the State of Michigan exercising its plenary

powers of control over local school districts enacted Act 48 of Public Acts of 1970 which automatically invalidated the April 7, 1970 plan, thereby frustrating the execution and operation of the Detroit School Board's attempts to desegregate. (151a).

It was this action of the State of Michigan that precipitated the complaint filed herein by plaintiffs alleging acts of *de jure* segregation on the part of the Board of Education for the School District of the City of Detroit, as well as the Superintendent of Public Instruction for the State of Michigan, the Michigan State Board of Education, the Governor of the State and its Attorney General. Although Michigan does have a procedure whereby the Attorney General may render opinions as to the legality of legislation and the Governor is accorded the privilege of addressing the legislature on matters of public importance, there is nothing in the record below to indicate that the Attorney General or the Governor took any action as State officers to advise the legislature of the unconstitutional aspects of Act 48 in depriving black children of their constitutional rights. The same is true as to the Superintendent of Public Instruction and the State Board of Education.

The plaintiffs originally filed their preliminary injunction to reinstate the Detroit Board's April 7, 1970 plan which had been thwarted by Act 48. The district court denied the injunction. On appeal, the Sixth Circuit affirmed the denial of the injunction while properly holding that Act 48 was unconstitutional insofar as it nullified the implementation of the Detroit Board's April 7th Plan. 433 F.2d 897 (1971).

On remand, the plaintiff sought implementation of a temporary plan of desegregation. The district court permitted the Detroit Board to introduce three temporary desegregation plans, one of which, the so-called Magnet Plan was approved by the court for implementation pending the trial on the merits.

Plaintiff again appealed this order of the district court, but the Sixth Circuit remanded with instructions that the case "be set forthwith and heard on its merits." 438 F.2d 945, 946 (1971).

The trial on the merits began on April 6, 1971 and lasted forty-one trial days through the spring and summer, 1971. All parties were ably represented by counsel, had the opportunity to

present evidence and fully participate in the trial. On September 27, 1971, the district court issued its Findings of Fact and Conclusions of Law, (17a), holding *inter alia* that the State of Michigan was guilty of *de jure* segregation committed directly by bodies or officers with state-wide jurisdiction and by its local subordinate agent, the Detroit Board of Education. The State Defendants and the Detroit Board appealed these Findings, but the Sixth Circuit, dismissed the Appeal as being untimely.

Subsequently, the district court ordered the Detroit Board to present Detroit-only desegregation plans and the State Defendants to present metropolitan plans of desegregation. After such plans had been presented to the trial court, a hearing on plans of desegregation limited to the geographic boundaries of the City of Detroit commenced. The State Defendants vigorously urged a Detroit-only remedy.

On March 28, 1972 the district court issued its ruling on the Detroit-only plan. The district court properly concluded that no Detroit-only plan could constitutionally desegregate the Detroit school system, because of this stark reality: without some 700,000 white students in the surrounding metropolitan Detroit community, any desegregation plan directed towards the 180,000 black school children and the 100,000 white school children within the Detroit School District would have resulted in unconstitutional black racially identifiable schools, encircled by schools racially identifiable as white, thereby continuing to racially isolate black children in the metropolitan Detroit community. The Chief Education Officer of Michigan, the Chief Executive of the State of Michigan and the Chief Legal Officer of the State of Michigan could not convince the district court otherwise though they attempted to do so.

It should be noted that the State Defendants were parties throughout this litigation who adequately represent the interests of their subordinate agents, the local school districts. Despite massive publicity received by this litigation, Petitioner school districts were apparently satisfied that their interests were properly represented for it was not until February 9, 16 and 17, 1972 that the Petitioner school districts asked for the right to intervene. The district court granted intervention on March 15, 1972. In passing

it should be noted that the publicity of the case resulted in the Detroit Federation of Teachers and a group representing home owners within the City of Detroit intervening as party defendants even prior to the trial on the issue of segregation.

The Petitioner districts had every opportunity to participate in the hearing on metropolitan plans and were not denied the right to present any evidence as to metropolitan plans. As proof of this fact, several school districts prevailed in limiting the metropolitan desegregation plan to exclude their school districts.

The district court, on June 14, 1972, (97a), adopted certain basic guidelines for metropolitan desegregation plans designed to eliminate the isolation of black children within the metropolitan Detroit community. The court used the guidelines announced by this Honorable Court designed to eliminate the vestiges of segregation "root and branch", and to do it in the most practical, convenient manner employing all known techniques of desegregation approved by this Honorable Court.

Of course, the findings of fact and conclusions of law as to the metropolitan desegregation plans announced on June 14, 1972, were far from complete, and the district court acknowledged this. The district court established a desegregation panel to develop a plan for further hearings. The Petitioner school districts were granted representation on that panel. The Superintendent of Public Instruction was also on that panel. The panel was directed to develop a metropolitan plan of desegregation consistent with the court's findings of fact and conclusions of law under a clear mandate that further hearings would be held on the plan. Petitioners, at all times, had full opportunity to participate in this procedure.

At the request of both the Attorney General of the State of Michigan, who has always represented the State Defendants and the Petitioner school districts, the District Judge certified the case for review pursuant to 28 U.S.C. 1292(b). The Court of Appeals for the Sixth Circuit in a three judge panel reviewed the entire proceedings. After the Petitioners were given every opportunity to file briefs along with the original parties and to argue orally, the Sixth Circuit on December 11, 1972, unanimously affirmed the district court.

On petition for rehearing *en banc*, the Sixth Circuit granted the petition, and again, the Sixth Circuit *en banc* affirmed the district court on all matters save the final form of the metropolitan remedy which they remanded to the district court with instructions to permit those districts which had not chosen to intervene in the hearing to develop a metropolitan plan.

On remand, the district court is proceeding to hold hearings to determine, with all petitioners present, what other local school districts should be brought into the hearings, and what procedure should be followed in developing the metropolitan plan. The hearings are not complete. There is much work to be done. The opportunity to provide additional legal input by interested parties is present and pending. The case, at this point, is still incomplete, making an appeal to this Honorable Court, most premature and most untimely.

SUMMARY OF ARGUMENT

The Sixth Circuit sitting *en banc* remanded this case to the district court for the development of a desegregation remedy pursuant to the guidelines previously announced by this Honorable Court, including the use of "mathematical ratios" as a "starting point in the process of shaping a remedy". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 US 1, 17-18 (1971). This case does not, and never has, involved a racial balance remedy. Among the issues which must yet be resolved in a final metropolitan desegregation plan are the extent and type of transportation to be required, the precise method of crossing school district boundaries to exchange pupils, the number of pupils to be exchanged and the faculty to be exchanged, if any. A case which is in this posture does not represent a final decision for which this Honorable Court should grant certiorari.

If this Honorable Court were to grant certiorari, it would place itself in the novel position, which it has consistently condemned, of deciding hypothetical, speculative and abstract questions as there is no specific desegregation plan now before this Court for review.

Under Michigan public school law, the sole responsibility for education rests with the State, and Michigan school districts are mere instrumentalities of the State subordinated to the State Board of Education and the Legislature and subject to pervasive State control. Thus, the *de jure* actions of the subordinate agent Detroit School District are binding on the State of Michigan just as the *de jure* actions of the State of Michigan are binding on the Detroit School District. It is the State of Michigan, and only the State of Michigan, that has committed *de jure* acts of segregation, and it is the State alone that must provide a remedy.

A Detroit-only desegregation plan would not eliminate unconstitutional racial isolation in the relevant metropolitan Detroit community. There are 180,000 black children and 100,000 white children in the Detroit School System – a system surrounded by 700,000 white school children in the metropolitan Detroit community.

The relevant metropolitan Detroit community is an intensely interrelated community both socially and economically with many

forms of metropolitan governmental services. Students in the metropolitan Detroit community already cross school district lines to attend school. Educational services are already provided to the metropolitan students on an inter-district basis. The boundaries of Michigan school districts in general bear no relationship to the boundaries of other municipal or county governments.

The arguments presented by the Petition of the State Defendants have failed to explain that if the State can eliminate 700 school districts out of 1438 school districts in a five-year period (1964-1968), including districts in the metropolitan Detroit community, for financial and educational reasons, then why are the Michigan school district lines so sacrosanct when it comes to protecting constitutional rights of black children?

The Michigan State Board of Education has always been a party to this litigation and has adequately represented the interests of its subordinate districts. Petitioner school districts, although having every opportunity to intervene in a case that had great publicity, chose to intervene in February, 1972. The Sixth Circuit in its remand has made it clear that all districts may participate in the fashioning of a metropolitan remedy, which still is in the process of being developed.

If the State of Michigan can continue to provide educational services for students on an inter-district basis and continue to transport students across school district lines, then a multi-district desegregation remedy is consistent with Michigan school law. It is mandatory for the district court, exercising its equity powers, to remedy the constitutional violation of the rights of 180,000 black school children isolated from the rest of the relevant metropolitan Detroit community. By practical necessity, this requires a multi-district remedy.

(acting alone or through its agent, the Detroit School District),

B. P. J.

REASONS FOR DENYING THE WRITS

I. CERTIORARI SHOULD BE DENIED AS THIS IS NOT AN APPEAL FROM A FINAL DECISION SINCE THE SIXTH CIRCUIT HAS REMANDED THE CASE TO THE DISTRICT COURT TO DETERMINE WHAT TYPE OF REMEDY SHOULD BE ORDERED, AND WHAT DISTRICTS, IF ANY, SHOULD BE INCLUDED IN THAT REMEDY.

A grant of certiorari would be improvident in this case as the decision of the Sixth Circuit is not a final decision. The Sixth Circuit agreed with the district court on its conclusion to consider a metropolitan remedy and remanded the case for the joinder of additional parties and for a determination of the relief to be granted the plaintiffs; namely what type of metropolitan remedy should be ordered. The district court has begun proceedings in compliance with the instructions of the Sixth Circuit.

Among the issues that must be resolved in the district court are (1) the identities of the school districts to be included in a final desegregation plan, (2) the extent and type of transportation to be required, (3) the precise method of crossing school district boundaries to exchange pupils, (4) the number of pupils to be exchanged, and (5) the faculty involved.

If "a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment," *Catlin* v. *U.S.*, 324 U.S. 229, 233 (1945), the June 12, 1973 decision of the Sixth Circuit is not a final decision. See *St. Louis, I.M. and S.R.R.* v. *Southern Express Company*, 108 U.S. 24, 28 (1883); *Morgan* v. *Thompson*, 124 F. 203, 204 (8th Cir. 1903).

This Honorable Court admittedly has power to grant certiorari in cases that are not yet final, but it has consistently refused to review interlocutory orders of the courts of appeals "unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the cause." *American Construction Company* v. *Jacksonville T & K.W.R. Company*, 148 U.S. 372, 384 (1893). This refusal to review especially follows when the case has

been remanded to the district court for further proceedings. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 204 U.S. 251, 257-58 (1916); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967).

The possibility that the Sixth Circuit has erred may present some slight inconvenience, but that inconvenience is much less than would result from repeated piecemeal appeals. On the facts of this case the inconvenience, if any, is hardly extraordinary, nor will delay in Supreme Court review cause any "embarrassment to the conduct of the cause." Neither the State of Michigan nor the Petitioner school districts are placed in any danger of being deprived of rights which cannot be vindicated by an appeal in the normal course of litigation. Assuming, *arguendo*, that the State and Petitioner school districts should be entitled to prevail on every substantive point they raise, those points will still be capable of vindication after the district court has concluded its hearing. Consequently, there is no "danger of denying justice by delay." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Gillespie* v. *U.S. Steel Corporation*, 379 U.S. 148 (1964).

Judge Friendly's opinion for the Second Circuit in *Taylor* v. *Board of Education of New Rochelle*, 288 F.2d 600, 602 (1961) dealt decisively with the related issue of finality of a district court decision after a finding of segregation and before the ordering of a remedy:

> "Upon full consideration, we conclude that we have no power to entertain the Board's appeal until the District Court has finished its work by directing the Board to take or refrain from action.
>
> "Familiar decisions of the Supreme Court establish the controlling principles. 'Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all.' *Cobbledick* v. *United States*, 1940, 309 U.S. 323, 324-325, 60 S.Ct. 540, 541, 84 L.Ed. 783. 'The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation.

'The case is not to be sent up in fragments * * *' *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341 [13 S.Ct. 356, 358, 37 L.Ed. 194]. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.' *Catlin* v. *United States*, 1945, 324 U.S. 229, 233-234, 65 S.Ct. 631, 634, 89 L.Ed. 911.

"A 'final decision' within 28 U.S.C. §1291, the basic statute authorizing appeals to the courts of appeals, and its predecessors going back to §§ 21 and 22 of the Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 83-84, 'is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' *Catlin* v. *United States*, supra, 324 U.S. at page 233, 65 S.Ct. at page 633. Plainly Judge Kaufman's decision of January 24, 1961 does not fit that description. It constituted only a determination that plaintiffs were entitled to relief, the nature and extent of which would be the subject of subsequent judicial consideration by him. What remained to be done was far more than those ministerial duties the pendency of which is not fatal to finality and consequent appealability, *Ray* v. *Law*, 1805, 3 Cranch 179, 180, 2 L.Ed. 404. An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own, *The Palmyra*, 1825, 10 Wheat. 502, 6 L.Ed. 375; *Barnard* v. *Gibson*, 1849, 7 How. 650, 12 L.Ed. 857; *Leonidakis* v. *International Telecoin Corp.*, 2 Cir., 1953, 208 F.2d 934; 6 Moore, Federal Practice (1953 ed.), p. 125 and fn. 5, although in all such cases, as here, this subjects the defendant to further proceedings in the court of first instance that will have been uncalled for if that court's determination of liability is ultimately found to be wrong.

* * *

"Here, while we understand defendants dislike of presenting a plan of desegregation and attending hearings thereon that would be unnecessary if the finding of liability were ultimately to be annulled, and also the possibly unwarranted

expectations this course may create, this is scarcely injury at all in the legal sense and surely not an irreparable one. Equally inapposite is the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 545-547, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528, also advanced by appellants, permitting review of orders 'which finally determine claims of right separable from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' Here the issue sought to be reviewed, far from being collateral to the main litigation, represents the very findings and conclusions upon which any final judgment against the defendants must rest."

Judge Friendly's rationale is equally persuasive and dispositive of this case.

For these reasons, certiorari should be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE THIS HONORABLE COURT CANNOT PROPERLY ASSESS THE PROPRIETY OF A MULTI-DISTRICT REMEDY WHEN ALL FACTUAL ASPECTS OF THE REMEDY ARE HYPOTHETICAL AND SPECULATIVE AND THEIR IMPACT, IF ANY, UPON EACH PETITIONER IS UNKNOWN AT THIS TIME.

At this stage of the case there are too few firm facts available to this Honorable Court in reviewing the work of the courts below. Petitioners' objections are to hypothetical conditions. Remedies in school segregation cases, being matters of equity, are characterized by a flexibility deeply rooted in the facts of each case. See *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 299-300 (1955); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 12-13, 15, (1971). As this Honorable Court has said, "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968). That task cannot be done well if this Honorable Court is not fully informed of the circumstances and options. The Supreme Court cannot properly evaluate the decisions of the courts below in the factual vacuum that exists at this point in this case. Every major measureable aspect of a desegregation remedy is unsettled in this case, as indicated in Reason I, *supra* at 13.

The Petitions for certiorari show on their face that they present hypothetical questions divorced from the concrete facts necessary to sound judicial decision-making. Petitioner Grosse Pointe Public School System refers to "the impact of the lower courts' proposed remedy upon the residents of every school district in the Detroit Metropolitan Area". Grosse Pointe Public School System, Petition for Writ of Certiorari, at 14. Yet that petition cannot point to an actual remedy agreed upon by those courts. Rather, Petitioner concedes that the district court's plan was vacated by the Sixth Circuit. (*Id.* at 16.) Nevertheless, in the eyes of Petitioner Grosse Pointe Public School System, the vacated plan "remains fully illustrative of the magnitude of a plan" the Petitioner wants to attack. Only if one assumes that the lower

courts are playing games with the parties, can one assume before rehearing that a vacated plan is "fully illustrative" of the ultimate plan. This Honorable Court does not sit to resolve "illustrative" issues but to deal with concrete legal issues. Petitioner jumbles statistics based on a vacated plan and statistics from a much larger metropolitan area in an effort to discredit a remedy that has not yet been ordered. (*Id.* at 16). Petitioner admits that "the exact geographical area and the number of students to be involved" are unsettled, but asserts that the consequences of a remedy will be "important" to Petitioner. Significantly, Petitioner cannot assert with absolute certainty that it will be included in the geographical area of the ultimate plan. Petitioner Grosse Pointe Public School System in effect concedes that all the critical facts are unknown: pupil reassignment and transportation, faculty reassignment, "governance, finance and administrative arrangements." (*Id.* at 17, note 25). Yet it asserts, as a justification for premature intervention of this Honorable Court, that the cost of the unknown factors is "inestimable". (*Id.* at 17, note 25). The fact that *all* aspects of the remedy are inestimable is good cause for this Honorable Court to stay its hand and allow the district court to finish its work.

Petitioners Allen Park Public Schools, *et al.*, are similarly uncertain of the scope of the remedy. They also vacillate between the vacated plan and the outer limits of the three county metropolitan area in asserting the unreasonableness of a remedy that has not yet been announced. Allen Park Public Schools, *et al.*, Petition for Writ of Certiorari, at 14-15. Their uncertainty is reflected in the very terms of the Statement of Questions Presented. Question II refers to an order "embracing *up to* eighty-five (85)" school districts and requiring the transportation of "hundreds of thousands" of children. (*Id.* at 3, emphasis added). Precision was obviously impossible at this stage of the case. Question III asserts a failure to afford a meaningful hearing to "Petitioners *against whom relief is imposed.*" (*Id.* at 4, emphasis added.) The wording of the question obscures the fact that relief has never been "imposed" against some of those petitioners and, for all that is now known, never will be. Other petitioners were included in the vacated plan but may or may not be affected by the next one.

Sound judicial administration will not be served by deciding major issues of constitutional law on the speculative factual basis presently available to this Honorable Court.

III. THE METROPOLITAN DESEGREGATION REMEDY ORDERED BY THE COURTS BELOW IS BASED ON SPECIFIC MICHIGAN PUBLIC SCHOOL LAW, SET IN THE CONTEXT OF THE RELEVANT METROPOLITAN DETROIT COMMUNITY, AND THUS CERTIORARI SHOULD BE DENIED.

The Sixth Circuit correctly concluded that the Public School System in Michigan is a State function and that the local school districts are mere "instrumentalities of the State created for administrative convenience". (165a). More succinctly stated, under Michigan law, "the school district is a State agency". *Attorney General, ex rel Kies* v. *Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902), *aff'd*, 199 U.S. 233 (1905).

Tracing the long history of State control over local public education in Michigan the Sixth Circuit noted as follows:

> "The Northwest Ordinance of 1787 governing the Territory of Michigan provided:
>
> > 'Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Art. III.
>
> "With this genesis, Michigan's four Constitutions have clearly established that the public school system in that State is solely a State function. The Constitution of 1835 in Article X, Section 3, provided, in part: 'The legislature shall provide for a system of common schools . . .' The Constitution of 1850, Article XIII, Section 4, provided, in part: 'The legislature shall . . . provide for and establish a system of primary schools . . .' Section 1 of the same Article provided, '. . . the Superintendent of Public Instruction shall have general supervision of public instruction . . .'
>
> "The Constitution of 1908 in Article XI, Section 2, provided that the Superintendent of Public Instruction 'shall have general supervision of public instruction in the State.' Article XI, Section 9, provided, in part as follows:

'The legislature shall continue a system of primary schools, whereby every school district in the State shall provide for the education of pupils without charge for tuition . . .'

"The Constitution of 1963, the present Constitution of the State of Michigan, in Article VIII, Section 2, provides, in part, as follows:

'The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.'

"In interpereting [sic] the above educational provisions of the Constitution of 1850, the Michigan Supreme Court stated: 'The school district is a State agency. Moreover, it is of legislative creation . . .' *Attorney General* v. *Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902). Again, interpreting the Constitution of 1850, the Supreme Court of Michigan in *Attorney General* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908), adopted lower court language which read:

'Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may chose to make it such. The Constitution has turned the whole subject over to the legislature . . .'

"The Supreme Court of Michigan interpreted Article XI, Section 9, of the Constitution of 1908 to mean:

'The legislature has entire control over the schools of the State subject only to the provisions above referred to. The division of the territory of the State into districts, the conduct of the school, the qualifications of teachers, the subjects to be taught therein are all within its control.' *Child Welfare* v. *Kennedy School Dist.*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

"In the leading case concerning construction of this section of the Michigan Constitution of 1963, the Michigan Supreme Court said:

'It is the responsibility of the State board of education to supervise the system of free public schools set up by the legislature and, as a part of that responsibility, to promulgate regulations specifying the number of hours necessary to constitute a school day for elementary school students as well as for other classifications or groupings of students, to determine the curricula and, in general, to exercise leadership and supervision over the public school system.' *Welling* v. *Livonia Board of Education*, 382 Mich. 620, 624, 171 N.W.2d 545, 546 (1969). See also *Governor* v. *State Treasurer*, 389 Mich. 1, 13, 203 N.W.2d 457 (1972).

"Michigan has not treated its school districts as sacrosanct. To the contrary, Michigan always has regarded education as the fundamental business of the State as a whole. Local school districts are creatures of the State and act as instrumentalities of the State under State control. *Cf. Senghas* v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962); *McLaughlin* v. *Board of Education*, 255 Mich. 667, 239 N.W. 374, (1931)." (165a-167a)

The Sixth Circuit also cited numerous examples illustrating the pervasive effect of State control over local school districts in Michigan. These examples serve to unequivocally substantiate the court's conclusion that local school districts are mere instrumentalities or agents of the State created for administrative convenience. As cited by the Sixth Circuit, examples were as follows:

"1. Following the holding of *Welling* v. *Livonia Board of Education, supra*, that there was no minimum length of day required under the 180-day school attendance rule absent a State Board of Education regulation, the Michigan State Board of Education, acting under its Constitutional mandate without legislative authority, established an administrative rule requiring local school boards to provide a minimum number of hours per school year. See, *School Districts Child Account for Distribution of State Aid*, Bulletin No. 1005, Michigan State Department of Education (1970). (167a-168a).

"2. Public Act 289 of 1964 (MSA §15.2299 (1) et seq., MCLA §388.681 et seq.) required Michigan school districts

to operate K-12 systems. When Public Act 289 become effective, 1,438 public school districts existed in Michigan. By the beginning of 1968, this figure had been reduced to 738, meaning that 700 school districts in Michigan have disappeared since 1964 through reorganization. Annual Report, Committee on School District Reorganization, 1968 Journal of the Senate 422-423 (March 1, 1968). (168a).

"3. Pursuant to Act 289 of 1964, *supra*, the State Board of Education ordered the merger of the Brownstown No. 10, Hand, Maple Grove and Carson school districts, all in Wayne County. The action is best explained by the fact that Brownstown was, at that time, the wealthiest school district in the State, indeed, with a property valuation of $340,000 backing each child, perhaps the wealthiest district in the nation, while the other three districts were extremely poor. (168a).

"4. When the Sumpter School District was on the verge of bankruptcy in 1968, the State Board of Education, acting under Public Act 239 of 1967 (MSA §15.2299 (51) et seq., MCLA §388.691 et seq.), merged the district with four adjoining districts, including the Airport School District. Significantly, though Sumpter was in Wayne County, Airport was in Monroe County, showing that county lines are not inviolate in Michigan. (168a).

"5. The Nankin Mills School District in Wayne County was beset with financial problems and had no high school. Again, pursuant to Act 239, the State Board of Education in 1969 ordered this school district to merge with the Livonia, Garden City and Wayne Community schools. (168a).

"6. When the Inkster School District in Wayne County was on the verge of financial bankruptcy, the Michigan legislature passed Public Act 32 of 1968 (MSA §15.1916 et seq., MCLA §388.201 et seq.) enabling the district to borrow $705,000 but on the condition that if the district could not balance its budget the State Board of Education could reorganize, merge or annex the district. The legislative history of Act 32 indicates at least two legislators voted against the bill in the House of Representatives because of the excessive control given to the State Board of Education:

'I voted No on House Bill No. 3332 because in setting up the machinery to bail out distressed districts, it takes from the local communities the control over their own educational system by providing for excessive arbitrary reorganization powers in the hands of the Board of Education. . .'

'This bill certainly sets up the State Board of Education to be a dictator of all school districts that run into financial problems.' 1968 Journal of the House of Representatives 1965. (168a-169a).

"7. Too small and too poor to operate a high school, the all-black Carver School District in suburban Oakland County reached a crisis in 1960 when other surrounding white districts refused to accept Carver pupils on a tuition basis. The Carver district was merged with Oak Park. (169a).

"8. The State Board of Education and Superintendent of Public Instruction may withhold State aid for failure to operate the minimum school year. MSA §15.3575, MCLA §340.575. In 1970, funds were withheld from the City of Grand Rapids School District. 17 Michigan School Board Journal 3 (March, 1970). For Attorney General Opinions holding that State aid may be withheld by the State Board of Education from the school districts for hiring uncertified teachers, defaulting on State loans and for other reasons, see Op. Att'y Gen. No. 880, 1949-1950 Report of the Attorney General 104 (January 24, 1949, Roth); No. 2333, 1955 Report of the Attorney General 561 (October 20, 1955, Kavanaugh); No. 4097, 1961-1962 Report of the Attorney General 553 (October 8, 1962, Kelley). (169a-170a).

"9. The State of Michigan contributes, on the average, 34% of the operating budgets of the 54 school districts included in the proposed Metropolitan Plan of Integration. In eleven of the 54 districts, the State's contribution exceeds 50% and in eight more, it exceeds 40%. State aid is appropriated from the General Fund, revenue raised through statewide taxation, and is distributed annually to the local school districts under a formula devised by the legislature. See, e.g., Public Act 134 (1971), MSA §15.1919(51), MCLA §388.611.

"Though the local school districts obtain funds from the assessment of local property, the ultimate authority in insuring equalized property valuations throughout the State is the State Tax Commission. MSA §7.631, et seq., MCLA §209.101, et seq.; MSA §7.206, MCLA §211.148; MSA §7.52, MCLA §211.34. The State's duty to equalize is required by the Michigan Constitution, Article IX, Section 3. This 'State equalized valuation' serves as the basis for calculating local revenue yields. See, *Ranking of Michigan Public High School – School Districts by Selected Financial Data*, 1970, Bulletin 1012, Michigan State Department of Education (1971). (170a).

"10. The Michigan School Code reaffirms the ultimate control of the State over public education. Local school districts must observe all State laws relating to schools,[1] hold school a minimum number of days per year,[2] employ only certified teachers,[3] teach civics, health and physical education and drivers' education,[4] excuse students to attend religious instruction classes,[5] observe State requirements when teaching sex education,[6] make annual financial and other reports to the Superintendent of Public Instruction,[7] adopt only textbooks which are listed with the Superintendent of Public Instruction[8] and must follow all rules and regulations of the State Department of Education.

"Local school districts, unless they have the approval of the State Board of Education or the Superintendent of Public

---

[1] MSA §15.3253(c), MCLA §340.252(c).

[2] MSA §15.3575, MCLA §340.575.

[3] MSA §§15.1023(10)(a), 15.3570, MCLA §§388.1010(a), 340.570.

[4] MSA §§15.1951, 15.3361, MCLA §§388.371, 340.361; MSA §§15.3781, 15.3782, MCLA §§340.781, 340.782; MSA §9.2511(c), MCLA §257.811(c).

[5] MSA §15.3732(g), MCLA §340.732(g).

[6] MSA §15.3789, MCLA §340.789.

[7] MSA §15.3612, MCLA §340.612; MSA §§15.3616, 15.3688, MCLA §§340.616, 340.688.

[8] MSA §15.3887(1), MCLA §340.887(1).

Instruction, cannot consolidate with another school district,[9] annex territory,[10] divide or attach parts of other districts,[11] borrow monies in anticipation of State aid,[12] or construct, reconstruct or remodel school buildings or additions to them.[13]

"The power to withhold State aid, of course, effects enormous leverage upon any local school district, since on the average 34 per cent of the operation budget of the 54 school districts included in the proposed Metropolitan Plan is paid for by the State.

"In the instance of the City of Detroit, the State exhibited its understanding of its power over the local school district by the adoption of Act 48 of the Public Acts of 1970 which repealed a high school desegregation plan previously adopted by the Detroit Board of Education, See 433 F.2d 897." (170a-171a).

As noted in the above excerpt from the Sixth Circuit Opinion, the State of Michigan eliminated 700 school districts between 1964 and 1968. (168a). Those school districts were eliminated by the State for educational and financial reasons. The fact that Michigan can, and did, eliminate nearly half of its local school districts in a five year period is overwhelming evidence that, in Michigan, local school districts are mere "instrumentalities of the State" that can be created, eliminated, or consolidated for the administrative convenience of the State. If this Honorable Court has any doubt about the pervasive state control of education in Michigan we urge this Honorable Court to re-read the Petition for Writ of Certiorari of Michigan's Attorney General and ask this simple question: Does the Attorney General at any point deny the

---

" [9] MSA §15.3402, MCLA §340.402.

[10] MSA §15.3431, MCLA §340.431.

[11] MSA §15.3447, MCLA §340.447.

[12] MSA §15.3567(1), MCLA §340.567(a).

[13] MSA §15.1961, MCLA §388.851, Op. Att'y Gen. No. 1837, 1952-1954 Report of the Attorney General 440 (Nov. 8, 1954)."

finding of the district court, affirmed by the Sixth Circuit, that local school districts in Michigan are mere state agencies through which the state acts?[3]

Since the Michigan State Board of Education has previously arranged for multi-district co-operation, and in some cases multi-district consolidation, for educational and financial purposes, there is no reason why the Michigan State Board of Education and its agents, in the instant case the metropolitan Detroit community school districts, cannot be involved in remedying a constitutional violation of the rights of black children.

In Michigan, it makes no difference whether the offender of those constitutional rights was the agent, the Detroit School Board, or the principal, the State of Michigan, or both. The action of the Detroit School Board is, under Michigan law, the action of the State of Michigan. Conversely, the actions of the State are binding on the Detroit School Board.

The instant decision by the Sixth Circuit, based on specific Michigan public school law set in the context of the relevant metropolitan Detroit community, is limited to Michigan and cannot be applied to other states having different applicable public school law. The public school law of Michigan, as enunciated by the Michigan Constitution, the State Legislature, judicial interpretation and avowed public policy, is clear and consistent: local school districts are mere instrumentalities or agents of the State of Michigan. Hence, the contention that school district boundaries in Michigan are sacrosanct, and that the Courts below have no power to grant effective remedial equitable relief beyond established school district boundaries, should be rejected and Certiorari denied.

---

[3] Because of the unique agency relationship existing between the State of Michigan and its local school districts, case law involving public education in other states may not necessarily apply. For example, in *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, ___ U.S. ___, 93 S.Ct. 1952 (1973) the Fourth Circuit noted that:

> "The power to operate, maintain and supervise public schools in Virginia is, and always has been within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education." 462 F.2d at 1067.

The Sixth Circuit, in the instant case, emphasized the distinction between Virginia and Michigan public school law, when it said:

> "The record in the present case amply supports the finding that the State of Michigan has not been subject to such (referring to Virginia law) limitations in its dealings with local school boards." (175a).

IV. CERTIORARI SHOULD BE DENIED AS THE COURTS BELOW DID NOT ERR IN ORDERING A METROPOLITAN REMEDY, WITHOUT REGARD TO ARTIFICIAL CITY OR MUNICIPAL BOUNDARY LINES, TO ELIMINATE UNCONSTITUTIONAL, RACIALLY IDENTIFIABLE SCHOOLS IN THE METROPOLITAN DETROIT COMMUNITY, SINCE THE STATE OF MICHIGAN, IN AND OF ITSELF, HAS SOLE RESPONSIBILITY FOR EDUCATION WITHIN ITS BOUNDARIES.

On the basis of the Record in this case the courts below correctly ordered a metropolitan remedy.

1. This is not a racial balance case. Instead the courts below used a racial proportion of the relevant community as a starting point for desegregation as specifically endorsed by *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

2. The relevant community is the metropolitan Detroit community; not just the City of Detroit.

3. A finding of *de jure* acts on the part of the Petitioner school districts, or the *de jure* establishment of school boundaries, is unnecessary because of the legal relationship between the Petitioner school districts and the State.

4. A Detroit-only remedy is constitutionally impermissible as such an alleged remedy is *not* a remedy which results in desegregation.

1. THIS IS NOT A RACIAL BALANCE CASE.

This is not a racial balance case. The district court found that the schools in Detroit, averaging 65% black, are racially identifiable in a metropolitan community that is three-quarters white. There is nothing constitutionally repugnant in having black majority schools *per se* in majority black communities. However, what is constitutionally repugnant is a remedy which would maintain a set of majority black schools, clearly identifiable as different, in a community in which the vast majority of the rest of the schools are all white. *Swann, supra.*

Petitioners' reliance on *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972) and *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972) for the proposition that predominately black schools can be tolerated in the metropolitan Detroit community is misplaced.[4] Both cases involved county-wide black communities. For that reason, the fact that the schools in the relevant community were racially identifiable as black was not constitutionally repugnant. In fact, this Honorable Court rejected an attempt by municipalities, within those counties, to withdraw from the county-wide school districts after a desegregation order had been issued. Neither *Emporia* nor *Scotland Neck* is applicable to the instant case because here the relevant community is the metropolitan Detroit community which is urban and majority white. The maintenance of identifiably black schools in such a community results in the racial isolation that *Brown I* condemned. *Brown* v. *Board of Education of Topeka* 347 U.S. 483 (1954).

Where the relevant community is majority white, then a remedy which retains racially identifiable black schools is repugnant to the Constitution of the United States. This Honorable Court, in *Swann*, specifically held that every school, or almost every school, should consist of a mixture of the races that roughly approximates the make-up of the student community as a whole.

The courts below examined the Detroit metropolitan community of 780,000 students and, in the words of *Swann*, used racial ratios as "a starting point in the process of shaping a remedy, rather than [as] an inflexible requirement." 402 U.S. at 25.

---

[4] We are unable to explain the State's reliance, page 35 of its Petition, on *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443 (1968). The *Raney* case rejected "freedom of choice" as a tool for desegregation. The question of "freedom of choice" is not an issue in the instant case.

The State also has relied on a 1969 Sixth Circuit case, *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546, 548 (1969), *aff'd per curiam*, 397 U.S. 232 (1970), for the proposition that a unitary school system can be effectuated in a school district that is majority black. The Sixth Circuit was obviously aware of its *Northcross* holding, and the particular facts which supported it, when it agreed with a metropolitan plan in principle, while remanding same to the district court with instructions to develop a metropolitan plan of desegregation.

2. THE COMMUNITY INVOLVED IS THE METROPOLITAN DETROIT COMMUNITY.

The relevant community for an appropriate remedy in the instant case is much larger than the City of Detroit. The district court's findings, adopted by the Sixth Circuit, noted the following facts clearly establishing the metropolitan nature of the Detroit community:

A. Many pupils in the metropolitan Detroit community already cross school district lines to attend school or receive educational services on an inter-district basis. (79a-80a)

B. The metropolitan Detroit area has been labeled by the Bureau of the Census as a Standard Metropolitan Statistical Area because of the high degree of interaction among the populace of the tri-county (Wayne, Oakland and Macomb) area (80a).

C. Recognizing the interdependence of its citizens, the Detroit metropolitan community has joined together in establishing the Metropolitan Detroit Water System. (80a).

D. The metropolitan Detroit community has joined together to establish a joint transportation system known as the Southeastern Michigan Transportation Authority (SEMTA). (80a)

E. The metropolitan Detroit community has joined together in establishing a Metropolitan Sewage System. (80a).

F. The metropolitan Detroit community has joined together in establishing a metropolitan park authority known as the Huron-Clinton Metropolitan Authority. (80a).

G. The local governments have recognized their interdependence by creating the Southeastern Michigan Council of Governments (SEMCOG). (80a).

H. The school authorities have recognized the metropolitan nature of education by creating intermediate school districts which provide educational services on an inter-district basis in each of the three counties. (80a).

I. A number of school districts encompass more than one city. For example, Petitioner, Grosse Pointe School System, encompasses five separately incorporated cities (Grosse Pointe Park, Grosse Pointe City, Grosse Pointe Farms, Grosse Pointe Woods, and Grosse Pointe Shores) and part of a sixth (Harper Woods), most of which have at least one common indistinguishable pavement border with the City of Detroit. (80a).

J. The economic and social life of metropolitan Detroit is metropolitan in scope. (70a-80a).

Subjective perceptions as to the metropolitan nature of the Detroit community coincide with above objective data. Metropolitan Detroit residents cross indistinguishable political lines casually in shopping, commuting to work, seeking recreation and seeking private or higher education. Dr. Robert Green, an expert witness in the trial below, testified to those perceptions when he referred to the stream of whites driving down the freeway from the suburbs to Detroit in the morning rush hour traffic and when he described how Detroit-educated whites have fled to the suburbs. Just as black children in a 90% black school still perceive their school as identifiably black, even though all children in the attendance zone go to the same school, children in a 60% to 80% black Detroit school will continue to perceive their school as identifiably black even though it is no different from any other school in Detroit – precisely because they know that there are nearby suburbs full of white youngsters receiving educations in all-white schools.

It would be a most unusual third grader of any race who could stand on Tireman Street, a paved indistinguishable boundary line, separating overwhelmingly white Dearborn from Detroit, and explain that a political boundary, rather than race, was the reason the white children south of Tireman attended a white school and the black children north of Tireman attended a black school. His perception of the metropolitan community also is conditioned by the metropolitan orientation of the communication media – news-

papers, television, radio – to which he is exposed. There is no evidence in the Record which permits an assumption that the perception of the community felt by a black child in Detroit is limited to the irregular boundaries of the school district of the City of Detroit and further limited to the racial composition of the students in the Detroit school system. It is obvious, in a community that is so interrelated between city and suburbs, that the black child would wonder why his school does not reflect the total racial composition of the metropolitan Detroit community, and why he has been racially isolated.

The avoidance of racial isolation has been a part of the law of school desegregation for 19 years. Mr. Chief Justice Warren formulated this issue for a unanimous Court in *Brown* v. *Board of Education of Topeka, (Brown I)*, 347 U.S. 483 (1954) when he said:

> "To separate them (blacks) from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

There are over a million children of school age in the metropolitan Detroit area. There are 280,000 school children in the Detroit system, of which 180,000 are black children. It would be unconstitutional racial isolation to confine these children to the city limits of Detroit. Their education is the responsibility of the State of Michigan. And the State of Michigan has established, for its own administrative convenience, the Detroit school system and the surrounding, basically all-white school districts.

We may add that in *Brown II*, 349 U.S. 294 (1955), Chief Justice Warren speaking to the method of desegregation, stated:

> "To that end, the Courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the fore-

going problems. They will also consider the adequacy of any plans the Defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 300-301.

The district court and the Sixth Circuit, both in panel and *en banc*, came to realize that the only way unconstitutional racial school isolation in the extensively interrelated metropolitan Detroit community can be eliminated is through a metropolitan desegregation remedy.

3. A FINDING OF *DE JURE* ACTS ON THE PART OF THE PETITIONER SCHOOL DISTRICTS OR THE *DE JURE* ESTABLISHMENT OF SCHOOL BOUNDARIES IS UNNECESSARY BECAUSE OF THE LEGAL RELATIONSHIP BETWEEN THE PETITIONER SCHOOL DISTRICTS AND THE STATE.

The suggestion that a *de jure* finding must be made against the suburbs is totally irrelevant. Assuming, *arguendo*, that the Courts below proceeded on a *de jure* basis, and that there cannot be any showing of *de jure* acts on the part of the Petitioner school districts, or with regard to the drawing of their boundary lines, the results here would be the same. The Sixth Circuit has demonstrated with clarity the pervasive power of the State of Michigan over individual school districts and has shown that the districts are mere instrumentalities or agents of the State of Michigan.

If the Detroit School Board committed *de jure* acts of segregation, as an agent or instrumentality of the State, its actions constitute State action, and the State of Michigan is responsible for a desegregation remedy. If the State of Michigan alone committed *de jure* acts of segregation, again, the State is responsible for a desegregation remedy. In fact, the court below found that both the State of Michigan and the Detroit School Board had committed *de jure* acts of segregation. The Petitioner school districts have conveniently ignored their relationship with the State of Michigan. It makes no difference what basis was used for drawing their boundary lines. These Petitioner school districts are an integral part of Michigan's system of education and when there is an unconstitu-

tional violation in that system they must form part of the remedy. If the State of Michigan is responsible for a remedy either because of the State's own actions or because of the actions of its agent, the Detroit School Board, or both, the State of Michigan can properly be ordered to implement a remedy that involves the school districts contained within the metropolitan Detroit community which, as State controlled agents created by the State for its convenience, are nothing more than the State of Michigan itself.

There are at least four elements that must be present for a desegregation plan to work.

(1) Every school, or almost every school, should contain a mixture of the races that roughly approximates the make-up of the student community as a whole. *Swann, supra; Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

(2) The plan should be educationally sound. *Swann, supra.*

(3) The plan should avoid resegregation. *Lemon* v. *Bossier Parish School Board*, 446 F.2d 911 (5th Cir. 1971).

(4) The plan must be practical. Each of these elements of a workable plan deserves to be examined more closely. *Swann, supra; Davis, supra.*

Racial Mix: We repeat that *Swann* validates the use of race in student assignments where the goal is desegregation rather than segregation. This Honorable Court has recognized the racial assignment concept as a primary teaching of *Swann* in *Kelly* v. *Metropolitan County Board of Education of Nashville and Davidson County*, 463 F.2d 732 (1972), *cert. denied*, 409 U.S. 1001 (1972), where this Honorable Court said:

> "Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

> We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. See *Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 16, 23-24. The District Judge in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error." 463 F.2d at 744

In the instant case, the district court found that in the metropolitan Detroit desegregation area the ratio of whites to blacks was approximately 75% to 25% and, therefore, on June 14, 1972, adopted a plan that would approximate this ratio, in the spirit of *Swann* as apparently approved by this Honorable Court in *Nashville.*

Educational soundness: No desegregation plan can function unless it is educationally sound. The educational soundness of an integration plan is to a large extent dependent upon how effectively it gives children an opportunity to have stable multi-racial experiences in groups composed substantially like the surrounding community. Such experiences, especially if begun as early as possible, give children of both major races accurate perceptions of their own abilities and those of the members of the opposite race. These informed self-perceptions in turn lead to more self-confidence and better scholastic performance. Multi-racial education is essential preparation for life in a multi-racial society. For this reason, if no other, schools should reflect the racial composition of the entire metropolitan community which they serve.

Practicalities: Swann and *Davis* obviously suggest that a plan must be practical. The transportation plan envisioned by the district court in its desegregation area is no more massive nor does it require rides longer in distance than are presently being undertaken by children in the metropolitan Detroit area. The clusters are so designed as to provide for administrative convenience. (72a-75a).

In other words, there is nothing in the plan to suggest that it is not practical. To illustrate, a substantial part of the educational program of the State is not conducted on a local school district basis. The intermediate school districts provide inter-district education for the physically handicapped, the emotionally disturbed

and vocational students. Frequently, with the exception of vocational education which is usually operated at large central skills centers, these special educational programs are operated on an inter-district basis. In point of fact, inter-district transportation has been a common phenomenon for the special education student for a good many years. If there is any distinction between the propriety of the State of Michigan providing a metropolitan desegregation remedy for the purpose of terminating the violation of constitutional rights and the propriety of the above inter-district activities, such distinction escapes the Detroit School Board.

Resegregation: No desegregation plan can function if it offers a ready avenue for resegregation. Even policies pursued by school board officials in good faith do not relieve them of their duty to fully eradicate the vestiges of segregation. *Clark* v. *Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970). It follows then that the courts should require school authorities to take steps to prevent resegregation by various means. *Lemon, supra.* Similarly, in protecting Fourteenth and Fifteenth Amendment rights, this Honorable Court has spoken of a "need to eradicate past evil effects and to prevent the continuation or repetition in the future of discriminatory practices..." *Louisiana* v. *United States*, 380 U.S. 145, 156 (1965). Were a less rigorous standard insisted upon by the courts, the constitutional obligation to eradicate segregation "root and branch" would be reduced to a pruning that would let the old evil grow back, more vigorous and more intractable than ever. See *Swann*, supra. Neither this Honorable Court nor the school authorities would be true to their duty were they to adopt a plan that will create more, rather than less, segregation.

Failure to adopt a metropolitan remedy would mean that the black children of the City of Detroit would, in effect, have had their constitutional rights denied and would be without a remedy required by *Swann*. In other words, we would have the anomaly that there is a constitutional wrong but no remedy.

In recent years it has been urged upon the federal court system that constitutional violations as to voting rights could not be remedied. See *Baker* v. *Carr*, 369 U.S. 186 (1962). This Honorable Court responded and now voting rights cases are an intricate part of our system of constitutional protections with remedies. See, e.g., *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). We suggest that the remedy in the instant case must be the metropolitan remedy adopted by the district court which considered the necessity of racial mix, education soundness, prevention of resegregation, and the practicalities of the situation, and which has attempted to eradicate the evils of segregation "root and branch" pursuant to the dictates of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

No more elegant statement of the legal and practical reasons for a metropolitan remedy in the Detroit metropolitan community has been made than the district court's own statement from the bench on July 19, 1972:

> "I think it should be clearly understood, however, that in my disposition of the motions before me today this Court does not retreat from nor abandon . . . our conclusion that any plan for the desegregation of the public schools of the City of Detroit would not accomplish desegregation and that only a Metropolitan Plan of desegregation would accomplish the desegregation of those schools."
>
> "The Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States, as I read it, is not geographically limited. It is difficult for this Court to believe that any higher judicial authority of the United States would or, for that matter Constitutionally could, engraft on that amendment any such geographical limitation. The vindication of the Plaintiffs' Constitutional right to equal education cannot be denied on the claim of alleged sovereign powers of local school districts." (Tr. 1947-48).

4. A DETROIT-ONLY PLAN IS CONSTITUTIONALLY IMPERMISSIBLE

It is the contention of all Petitioners that the district court's finding that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city", is in error. This contention completely ignores the

constitutional rights of 280,000 Detroit school children.

We call this Honorable Court's attention to what the district court stated in its Findings of Fact and Conclusions of Law as to Detroit-only plans in its Opinion of March 28, 1972.

With regard to Defendants' Plan A, the district court found:

"4. As conceded by its author, Plan A is neither a desegregation nor an integration plan." (54a).

As to Defendants' Plan C, the district court held:

"2. We find that this plan covers only a portion of the grades and would leave the base schools no less racially identifiable." (54a).

Insofar as Plaintiff's Plan was concerned, the district court said:

"7. The Plaintiffs' Plan would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black." (55a).

"8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the City and the system, thereby increasing the Black student population." (55a).

Thus, the district court's conclusions of law on this point, were most explicit.

"2. On the basis of the court's findings of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the *greatest possible degree of actual school desegregation. Green* v. *County School Board,* 391 U.S. 430; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *West*

Feliciana Parish School Board, 396 U.S. 290; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1. (Emphasis added). (56a).

* * *

"4. *Plaintiffs' Plan*, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, *would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.* (Emphasis added). (56a).

"5. The conclusion, under the evidence in this case, is inescapable that *relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city.*" (Emphasis added). (56a).

The Sixth Circuit emphatically agreed with the district court when it said:

> "At the outset it is obvious from what we have said pertaining to the inadequacy of any Detroit only desegregation plan that this court feels that some plan for desegregation beyond the boundaries of the Detroit School District is both within the equity powers of the District Court and essential to a solution of this problem." (173a)

As the above citations indicate, both the district court and the Sixth Circuit have agreed that complete relief within Detroit is constitutionally impossible. Detroit is the hub of a highly interrelated metropolitan area which contains a public school population that is approximately 75% white and 25% black. Yet the student population within the Detroit school system is 65% black and 35% white. There are no steps the Detroit Board of Education can take within its boundaries which would desegregate the Detroit public schools.

This Honorable Court should not grant certiorari. The remedy proposed is consistent with Michigan school law and the metropolitan nature of Detroit. It recognizes the fact that in the metropolitan Detroit community, governmental services – parks, water, sewage, transportation and education – have assumed metropolitan dimensions. Thus, a metropolitan desegregation remedy is compelling in its logic and irrefutable in its necessity.

V. SINCE THIS HONORABLE COURT HAS ENCOURAGED DISTRICT COURTS TO FASHION BROAD, TAILOR-MADE, EQUITABLE REMEDIES FOR THE ELIMINATION OF CONSTITUTIONAL VIOLATIONS IN EACH GIVEN SITUATION, THERE IS NOTHING UNCONSTITUTIONAL IN THE INSTANT REMEDY, PURSUANT TO ESTABLISHED MICHIGAN PUBLIC SCHOOL LAW, SO AS TO JUSTIFY CERTIORARI.

As the courts below clearly indicated, education in Michigan is solely a function of the State. Local school districts are mere creatures of the State acting as agents or instrumentalities of the State under pervasive State control.

When the district court, having heard over fifty-eight days of testimony, including five days on a Detroit-only desegregation remedy, ruled in favor of a metropolitan desegregation remedy, it was simply responding to this Honorable Court's directive to "make every effort to achieve the greatest possible degree of actual desegregation." *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). The Sixth Circuit twice (December 8, 1972 and June 12, 1973) (110a-111a) approved the necessity of a metropolitan desegregation remedy as found by the district court.

The legal path for the metropolitanization of school districts was first cleared by this Honorable Court in the so-called voting rights cases. Those decisions established that constitutional requirements supercede the importance of maintaining State created legislative districts. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

The concept of ignoring political division lines for purposes of guaranteeing constitutional rights has been extended to school districts. Where a city attempted to remove its schools from a county system when the latter was ordered to establish a unitary school system, the Fifth Circuit refused to permit the secession because it would have had a substantial adverse effect on desegregation. *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971). The court observed:

> "[S]chool district lines within a State are matters of political convenience." 448 F.2d at 752.

In another case, a district court refused to permit the creation of two school districts where one could operate as easily as two, and where the creation of two school districts was obviously designed to foster racial segregation. *Turner* v. *Warren County Board of Education*, 313 F.Supp. 380 (E.D. N.C. 1970). See also, *Hall* v. *St. Helena Parish School Board*, 197 F.Supp. 649, 658 (E.D. La. 1961), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962); *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F.Supp. 352 (E.D. Ark. 1970), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970).

The principle that school district lines may not be used for purposes of violating fundamental constitutional rights has recently been recognized by this Honorable Court. School districts are not permitted to withdraw from county-wide school systems where the effect of such a separation would impede the process of dismantling a segregated school system. *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972).

Refusal to permit the separation of school districts where such action would foster segregation has its counterpart in the court-ordered merger of districts. In *Haney* v. *County Board Education of Sevier County*, 410 F.2d 920 (8th Cir. 1969), the Eighth Circuit ordered the merger of a white school district and a black school district even though they had been maintained as separate units for fourteen years. The court declared:

> "[S]tate political subdivisions have long ago lost their mastery over the more desired effects of protecting the equal rights of all citizens." 410 F.2d at 924.

The Eighth Circuit viewed merger of the two districts in Sevier County as the only possible means of effectively desegregating the schools. In Texas, the annexation and consolidation of all-black school districts with nearby biracial units was ordered as a means of achieving meaningful racial desegregation. *United States* v. *State of Texas*, 447 F.2d 441 (5th Cir. 1971). With regard to changes in school district boundaries, the Fifth Circuit specifically directed:

> "Defendants shall not permit, make arrangements for, approve, acquiesce in, or give support of any kind to changes

in school district boundary lines – whether by detachment, annexation, or consolidation of districts in whole or in part – which are designed to, or do in fact, create, maintain, reinforce, renew, or encourage a dual system based on race, color, or national origin." 447 F.2d at 443-444.

In short, the courts have found that the State has an affirmative duty to enforce Fourteenth Amendment rights.

Bradley v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, ___U.S.___, 93 S.Ct. 1952 (1973) can be clearly distinguished from the instant case. In *Richmond*, the district court ordered consolidation of three separate school districts, all of which were declared to be unitary by the Fourth Circuit. In the instant case, there is no district court order for consolidation of school districts, but rather an order for a study of plans for the reassignment of pupils in school districts comprising the metropolitan Detroit community. In *Richmond*, the district court found that neither the past nor present Virginia Constitutions or statutes would have permitted the State Board of Education, acting alone, to have consolidated three school districts into a single system under the control of a single school board. The Fourth Circuit merely held that compulsory consolidation of political subdivisions in the State of Virginia was beyond the power of a federal court because of the Tenth Amendment to the Constitution of the United States. The instant case involves no such restructuring of school districts. Rather, it merely concerns the transfer of students.

Moreover, as we have already pointed out in this Brief,[5] the Board of Education of the State of Michigan has the power to consolidate school districts and in fact has utilized that power to consolidate seven hundred school districts in five years for purposes that could have been no more important than remedying the violation of the constitutional rights of 180,000 black school children. Given these considerable distinctions between *Richmond* and the instant case, Petitioners' substantial reliance on the *Richmond* holding is without justification.

In the instant case, the courts below recognized – not Vir-

[5] See Reason III at 19, *supra*.

ginia law or the law of any other state – but only Michigan public school law. The courts also found that: the metropolitan Detroit community is extensively interrelated, both economically and socially; has already taken massive steps toward the provision of metropolitan community and government services; and that in the relevant metropolitan Detroit community the isolation of 180,000 black school children in racially identifiable schools was in violation of the Constitution of the United States and required remedy.

Petitioners' reliance on *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D. N.J. 1971), *aff'd*, 404 U.S. 1027 (1972) for the unique proposition that there can be a finding that racially identifiable schools violate constitutional rights, but that the remedy for the violation may and must be the continuation of racially identifiable schools, is wholly without foundation. Petitioners fail to distinguish between the basic right to a remedy and the remedy itself.

Spencer merely held that a statute of the State of New Jersey making school district boundary lines coterminous with the boundary lines of municipalities in the State was not unconstitutional. The case did not involve an effective allegation that the act of enacting the statute was segregation by State action; rather it contemplated an assertion that the act involved a suspect classification based on race. On those assertions the lower court found, and this Honorable Court affirmed, that the classification was neutral and had a reasonable basis. The case has no application to the appropriateness of school desegregation remedies, and does not even attempt to establish a right to a desegregation remedy.[6]

Petitioners reliance on *Goss* v. *The Board of Education of the City of Knoxville*, Nos. 72-1766-1767 (6th Cir., July 18, 1973) is equally misplaced. As the Sixth Circuit noted in that case:

> "Appellant complained that the result in this case is inconsistent with that reached by this Court in other school

---

[6] We suggest quite strongly that if *Spencer* were tried in the State courts of New Jersey the result could very well have been different. In 1971, the year that *Spencer* was first decided, the Supreme Court of New Jersey held that racial imbalance is unconstitutional under the State's Constitution. *Jenkins* v. *Township of Morris School District*, 58 N.J. 483, 279 A.2d 619 (1971).

desegregation cases. If the result is different, it is only because the evidence produced in the District Court required a different result... This Court has consistently upheld the decrees of District Judges of this Circuit when properly supported by the pleadings and evidence..." Slip Op. at 4.

The Sixth Circuit made this same point in the instant case when it said:

"We reject the contention that school district lines are sacrosanct and that the jurisdiction of the District Court to grant equitable relief in the present case is limited to the geographical boundaries of Detroit. We reiterate that school districts and school boards are instrumentalities of the State. *See Cooper* v. *Aaron*, 358 US 1, 16 (1958). As early as *Brown II* the Supreme Court pointed out that:

'[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, ...' 349 U.S. at 300-01.

The Supreme Court has held that school boundary lines cannot be changed or new school systems created where the result is a larger imbalance in racial ratios in school systems where all vestiges of enforced racial segregation have not been eliminated. *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). This is true regardless of "dominant purpose." *Wright* v. *City of Emporia*, 407 U.S. at 462.

If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose." (174a)

In the instant case the Sixth Circuit correctly affirmed the district court's use of traditional equity powers, within the guidelines set forth in *Swann*, to remedy constitutional violations. The *Swann* decision emphasized:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S. at 15.

We cannot ignore the equity teachings of *Brown II*, which are as equally important today as they were in 1955 when this Honorable Court said:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the Constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these Constitutional principles cannot be allowed to yield simply because of disagreement with them.

"[T]he courts may consider problems relating to administration, arising from the physical condition of the school plant, the school transportation systems, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. 294, 299-300.

This posture was reiterated in *Swann*, which quoted the above language verbatim, 402 U.S. 1, 12-13 (1971). There is absolutely no reason why the power of a court of equity should not be extended to metropolitan school desegregation plans. Under principles of

equity, the remedy must be evaluated by assessing its capacity to achieve the ultimate objective – the establishment of a unitary school system.

Since constitutional rights have been violated, the district court, affirmed by the Sixth Circuit, was within the scope of its equity powers in remedying the violation by ordering a metropolitan plan of desegregation based upon Michigan public school law as it applies to the relevant metropolitan Detroit community.

Returning to our initial proposition, the State of Michigan controls all education in Michigan. The Detroit School Board is its instrumentality. If either or both have violated the constitutional rights of black school children, then the remedy can extend to the other school districts in the metropolitan Detroit community, because they are mere instrumentalities of the State, and the State, acting through its agents, must remedy the situation.

VI. THE COURTS BELOW FOUND SYSTEMATIC ACTS OF SEGREGATION AFFECTING THE CONSTITUTIONAL RIGHTS OF BLACK CHILDREN FOR WHICH THE STATE DEFENDANTS ARE RESPONSIBLE.

The Detroit Board of Education has chosen not to appeal the Sixth Circuit's decision because it believes that there is no appealable issue. *Keyes* v. *School Dist. No. 1*,___U.S.___, 37 L.Ed. 2d 548 (1973) indicates that this Honorable Court, in desegregation cases, is more concerned with the legal standard applied by the courts below than the specific factual findings of unconstitutional acts of segregation. Regardless of the relative culpability of Defendants below, if a constitutional violation has been found under the appropriate legal standard, a remedy must issue. Public school education is a function of the State of Michigan. Clearly it is the State of Michigan that must provide the remedy in the instant case.

The State of Michigan functions through subordinate school districts which are its agents. The expendability of those school districts is illustrated by the fact the State of Michigan eliminated seven hundred of them between 1964 and 1968, for financial and educational purposes. Yet, what reason, other than segregatory intent, could explain the State's contradictory position. On the one hand, it is willing to eliminate numerous school districts for

financial and educational purposes, but on the other hand, it refuses to accept a necessary multidistrict solution to its own violation of black children's constitutional rights.[7]

Prior to the district court's finding of unconstitutional acts of segregation in the Detroit School System, the Detroit School Board, as agent of the State of Michigan, attempted to desegregate high schools within the City of Detroit. The State of Michigan, through the enactment of Public Act 48 of 1970, thwarted the efforts of its agent, the Detroit School Board, to desegregate the Detroit school system. The district court (28a) and the Sixth Circuit (151a) both found that the enactment of Public Act 48 was one of several systematic acts which helped to create and maintain segregated conditions within the Detroit school system. segregated conditions within the Detroit school system.

The State challenges the findings of the district court and the Sixth Circuit as to the effect of Public Act 48. Public Act 48 was declared unconstitutional by the Sixth Circuit. The Act's statutory stigmatization of black children, because of race, occurred as late as 1971 and would certainly fall within the *Keyes*

---

[7] The State asserts in its Petition at 15, footnote 3, that the Detroit School Board's decision not to petition for certiorari in this case is "proof positive that under Michigan law, the Detroit Board of Education governs and controls the conduct of the school district of the City of Detroit". In light of the examples of State control cited in this Brief and found to be true by the district court and the Sixth Circuit, such a statement is totally without merit. It is true that under MSA §§15.3154 and 15.3192 local school districts may sue or be sued. However, the State fails to point out that this privilege was granted to the local school districts by the state legislature as a matter of administrative convenience in the processing of legal matters involving the schools.

In addition, the State in its Petition at 15-16, erroneously cites the Sixth Circuit Opinion (177a) to substantiate its makeweight claim that there is no agency relationship between the State Defendants and the local school districts. To the contrary, the citation (177a) contains no denial of an agency relationship – express or implied–but rather refers to a completely different issue, the right of other school districts to be made parties. In fact, the previous page (176a) states quite specifically: "Under the authorities heretofore discussed, these school districts are arms and instrumentalities of the State of Michigan."

guidelines that racially inspired actions have an impact beyond the particular schools that are the subjects of those actions. Public Act 48 was sufficiently proximate to other acts of segregation found by the courts below to establish a requisite causal nexus between those prior state acts of segregation and the resulting pattern of unconstitutional segregation.

In its Petition for Certiorari,[8] the State asserts, under Michigan law, that the Michigan Superintendent of Public Instruction had no control over school site selection prior to 1949 and after 1962. Furthermore, the State indicates that most of the school construction relied upon by the lower courts in finding acts of *de jure* segregation occurred after 1962. This Honorable Court in *Keyes*, however, pointed out that the site selection for even one school in a school district the size of the Denver School District (96,580 pupils in 1969 and 119 schools) can have a substantial reciprocal effect on the racial composition of other nearby schools.

> "Similarly, the practice of building a school – such as the Barrett Elementary School in this case – to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school', 303 F.Supp. at 285, has a substantial reciprocal affect on the ratio composition of other nearby schools." _____ U.S. _____, 37 L.Ed.2d 559.
>
> * * *
>
> "The Court found that by building Barrett Elementary School west of the Boulevard and by establishing Colorado Boulevard as the Eastern boundary of the Barrett attendance zone, the Board was able to maintain for a number of years the Anglo character of the Park Hills School." _____ U.S. _____, 37 L.Ed.2d 561.

It is apparent from *Keyes* that even discrimination in one school site selection can be pervasive considering the long range effect that school site locations can have on the racial composition of surrounding areas. The courts below predicated their finding, in the instant case, on this very proposition.

---

[8] State Petition at 22-23.

The State erroneously asserts[9] that the late 1950's practice of busing black Carver School District high school students to black inner-city schools (while by-passing nearby all white high schools) should be overlooked as evidence of discrimination in light of the 1960 merger of the Carver School District with the predominately white Oak Park School District. The *Keyes* standard does not uphold the State's contention. Can there be any doubt that the discriminatory treatment of the black Carver school district high school students as late as 1959 had "a profound reciprocal effect on the racial composition of residential neighborhoods within [the] metropolitan area" of Detroit?___U.S.___, 37 L.Ed. 2d 559.

The State and school district Petitioners (except Grosse Pointe) cite *San Antonio Independent School District* v. *Rodriguez*, 411 US 1 (1973), for the rule that "this Court has never doubted the propriety of maintaining political subdivisions within the states and has never found in the Equal Protection Clause any *per se* rule of territorial uniformity (citations omitted)".[10] But *Rodriquez* was a school finance case, not a desegregation case. The inappropriateness of a "*per se* rule of territorial uniformity" in that case was confined to the financing of school districts, for which a "rational basis" legal standard was developed. The instant case, however, is a desegregation case concerned with the denial of equal protection on racial grounds.[11]

The State has suggested that certain State officials, Defendants below, are improper parties to this suit by virtue of the sovereignty provisions of the Eleventh Amendment.[12] The argument presented by the State is not novel. It previously has been made by states in an attempt to frustrate federal court remedial orders in the area of school desegration. It has consistently been laid to rest as quickly as it has been raised. The

[9] State Petition, at 21.

[10] 411 U.S. 54, cited at 24 of State Petition and at 17-18 of School District Petitions.

[11] Except for a minor finding by the District Court (152a), inter-district financial disparities are not mentioned by the courts below.

[12] The genesis of this argument dates back as early as *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

response to the State's argument is the universal holding of courts that it is the duty of state officers to support both the Constitution and the rights guaranteed against infringement by the states under the Fourteenth Amendment.

In *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964), which involved the closing of public schools and the operation of a system of private schools by the county with the acquiescence of the Commonwealth of Virginia, Mr. Justice Black, speaking for a unanimous Court, summarily dismissed the Eleventh Amendment argument.

> "It is contended that the cases and action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that State and county officials were depriving Petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex parte Young*, (citation omitted), that suits against State and County officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." 377 U.S. at 228.

The Court went on to state that the district court could, in addition to its injunctive powers, force the various Defendants, that is, the Board of Supervisors, School Board, Treasurer, Division Superintendent of Schools of Prince Edward County, the State Board of Education and the State Superintendent of Education, all of whom were held to have duties which related "directly or indirectly to the financing, supervision, or operation of the schools", to undertake positive action to reopen the public schools in the county:

> "For the same reasons, the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination a public school system in Prince Edward County . . ." 377 U.S. at 233.

Furthermore, as the district court correctly recognized in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 318 F. Supp. 786 (W.D. N.C. 1970), the implementation of procedures

necessary to assure any Constitutional rights of the individual may place, directly or indirectly, additional financial burdens upon the State, even though it is not a formal party to the proceedings:

> "However, a Constitutional right has been denied, this court believes that it is the Constitutional right that should prevail against the cry of 'unreasonableness'. . . . The unreasonableness of putting the State to some expense cannot be weighed against or prevail over the privilege against self-incrimination, or the right of people to be secure in their homes. If, as this court and the Circuit Court have held, the rights of children are being denied, the cost and inconvenience of restoring those rights is no reason under the Constitution for continuing to deny them." (Citation omitted). 318 F. Supp. at 801.

Thus, it becomes readily apparent that State Defendants, through the exercise of inherent powers which they possess as officers and agents of the State, can and should effectuate and implement the remedy ordered by the courts below. School boards in Michigan being but agents of the State, any finding of unconstitutional segregatory actions traceable to the state, if not clearly erroneous, compels the conclusion that the state shall be held accountable and shall be included in a remedy.

VII. PETITIONER SCHOOL DISTRICTS HAVE NOT BEEN DENIED DUE PROCESS OF LAW SINCE THEY ARE AGENCIES OF THE STATE BOARD OF EDUCATION, WHICH HAS BEEN A PARTY TO THIS LITIGATION FROM ITS INCEPTION, AND WHICH HAS ADEQUATELY PROTECTED THE INTERESTS OF THE PETITIONER SCHOOL DISTRICTS.

The Petitioner school districts have not been denied due process of law. Throughout the proceedings in the courts below, State Defendants including the State Board of Education had been joined and did participate fully in all phases of the trial and early appeals. As the State was represented, the school districts were represented, for under Michigan law local school districts are mere agencies and instrumentalities of the State. Education in Michigan is a state function and not a matter of local concern except as the legislature may choose to make it such.[13] The joinder of all possible parties need not be had if the various interests are likely to be adequately protected by those already parties to the cause, and joinder would be onerous or defeat jurisdiction. *Isdaner* v. *Beyer*, 53 F.R.D. 4 (D.C. Pa. 1971). The interests of the local school districts, being identical to those of the State, were adequately represented by the State Defendats. Cf. *Higgins* v. *Board of Education, City of Grand Rapids*, No. 6386 (D.C. W.D. Mich., July 18, 1973), Slip Op. at 79-80.

To have required joinder of local school districts, prior to the ruling that a Detroit-only plan would not remedy the violation found in this cause, would have been not only onerous, but impossible. Joinder is required after it becomes apparent that additional parties will be necessary in order to afford complete relief in the proceedings. F.R.C.P. 19. *Bradley* v. *School Board of the City of Richmond*, 51 F.R.D. 139 (D.C. Va., 1970). Prior to the hearing and decision that a Detroit-only plan would not be effective, there was no indication that additional parties would be necessary to afford complete relief. As of that point in time, the advisability of joinder became apparent as to Petitioners and to the district court.

---

[13] See Reason III, *supra*, at 19-26.

The Sixth Circuit recognized this in vacating all proceedings subsequent to the hearing on Detroit-only plans and remanding to the district court for a hearing on the propriety of a Metropolitan remedy, after joinder of the school districts likely to be affected thereby. *Bradley* v. *Milliken,* Nos. 72-1809-1814, (6th Cir., June 12, 1973). (244(a)-245(a)). To have called for a joinder of local school districts prior to the date that it became apparent that they might be affected by the remedy in this cause, would have required that all local school districts throughout the State of Michigan be joined, pending a determination by the district court regarding which of them would *not* be affected by the remedy necessary to grant Plaintiffs below full relief. This would have not only been onerous, but of no substantive merit, as the State Defendants had already been joined and were able to adequately protect whatever interests local school districts may have had in the litigation.

There is no indication by Petitioner school districts that the State defendants did not adequately represent their interests in the litigation, prior to their joinder; if such were the case, Petitioners had adequate remedy during the course of the trial proceedings to request intervention on that basis. F.R.C.P. 24 (a) (2); *Hatton* v. *County Board of Education of Maury County,* 422 F. 2d 457 (6th Cir. 1970).

Finally, Petitioners claim that the conditions imposed upon them by the Sixth Circuit in the litigation of matters on remand constitute a denial of due process. The hearing granted, in order to meet requirements of due process, must be meaningful. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). However, reasonable conditions may be imposed upon such a hearing. *Owenby* v. *Morgan,* 256 U.S. 94 (1921).

The denial by a state, through its statutes, of the right of a litigant to raise certain defenses in an action brought against him, does not constitute a denial of due process, *Lindsey* v. *Normet,* 405 U.S. 56 (1972). The Sixth Circuit in this cause has provided Petitioners with a hearing which will deal with those matters which directly affect them – the formulation of a proper remedy within the guidelines enunciated by this Honorable Court. The relitigation of issues already decided in the district court in this

cause would add nothing to the question of *de jure* segregatory acts by the State Defendants and the Detroit Board of Education, as found by the district court and affirmed by the Sixth Circuit *en banc*. A relitigation of the issues regarding the propriety of a Detroit-only plan would also add nothing to the present status of this cause. Presentation of evidence regarding the propriety of a Detroit-only plan by Petitioners would be of no substantive merit and would be cumulative to that presented by State Defendants including the State Board of Education in the hearing below.

CONCLUSION

For the reasons above stated it is respectfully submitted that this Honorable Court deny the Petitions for Writs of Certiorari.

Respectfully submitted,

RILEY AND ROUMELL

By: GEORGE T. ROUMELL, JR.

JOHN F. BRADY
THOMAS M. J. HATHAWAY
GREGORY P. THEOKAS
C. NICHOLAS REVELOS, *Of Counsel*
720 Ford Building
Detroit, Michigan 48226
Telephone: 313/962-8255

Counsel for Respondents,
BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF THE CITY OF DETROIT, a school district of the first class;
PATRICK McDONALD,
JAMES HATHAWAY and
CORNELIUS GOLIGHTLY,
members of the Board of Education of the City of Detroit and
NORMAN DRACHLER, Superintent of the Detroit Public Schools.

Dated: October 5, 1973

APPENDIX

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XI provides:

Limitation of judicial powers.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Section 1, provides:

Citizenship; security of persons and property, due process and equal protection clauses.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XV, Section 1, provides:

Right of citizens to vote; race; color.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Michigan Constitution of 1963, Art. 8 § 2 provides:

Free public elementary and secondary schools; discrimination.

Section 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

UNITED STATES STATUTES

Judicial Code, 28 U.S.C. § 1292(b) provides:

§ 1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

MICHIGAN STATUTES

Act 48, Sec. 12, Mich. Pub. Act of 1970 provides:

388.182 Attendance provisions, implementation; conditions. [M.S.A. 15.2298(12)]

Section 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing or modifying attendance provisions the first class school district boards established under the provisions of this amendatory act shall have a policy of open enrollment and shall enable students to attend a school of preference but providing priority acceptance, insofar as practicable, in cases of insufficient school capacity, to those students residing nearest the school and to those students desiring to attend the school for

participation in vocationally oriented courses or other specialized curriculum.

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 19 provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will

have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Fed. R. Civ. P. 24 provides in part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

OCT 17 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,

Petitioner,

vs.

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN, KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools; WILLIAM G. MILLIKEN, Governor of the State of Michigan and ex-officio member of the Michigan State Board of Education; FRANK J. KELLY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate, and

(*Continued on Reverse Side*)

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

ROSS, BRUFF AND HENDRIKSEN
Attorneys for Professional
Personnel of Van Dyke
215 S. Gratiot
Mt. Clemens, Michigan
942-6281

Interstate Brief & Record Co., 1326 Randolph St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Granting the Writ	2
Conclusion	5
Appendix	7

INDEX OF AUTHORITIES

Cases:	Page
Oliver v. School District of Kalamazoo, 448 F. 2d 635 (CA 6, 1971)	3
Smuck v. Hobson, 408 F 2d 175 (Dist of Col District, 1969)	3
Statutes:	
M.C.L.A. 423.211	3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1973
No.

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,
Petitioner,

vs.

RONALD BRADLEY, et al.,
Respondents

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

The briefant, Professional Personnel of Van Dyke, upon Order of the Sixth Circuit Court of Appeals, was granted the right to intervene in this cause.

This brief is written in support of the three Petitions for Writ of Certiorari previously filed herein. Its page references are to the Petition of the Grosse Pointe School System.

STATEMENT OF THE CASE

Professional Personnel of Van Dyke is an independent, i.e., unaffiliated, labor union, representing some three hundred and fifty-three teachers in the Van Dyke School District. It is the exclusive bargaining agent of such teachers, having been so elected under the appropriate statutes of the State of Michigan (423.211 M.C.L.A.). As such exclusive bargaining agency, it has entered into a labor contract, (called "Master Agreement" by the par-

ties) with the School District of Van Dyke. Such agreement covers the salaries, fringe benefits, class size, teacher assignments, grievance procedure and teacher responsibility.

The school district is located in southeast Macomb County (immediately north of Detroit). It has 1,500 students.

When, at the trial level, it first became apparent that the trial judge might fashion a remedy that encompassed school districts other than the defendant, School District of the City of Detroit, Professional Personnel of Van Dyke petitioned for the right to intervene, or, in the alternative, for leave to intervene. This petition, filed on February 22, 1972, was denied by order dated March 15, 1972. Professional Personnel then filed a motion for re-hearing of its original petition. Filed on April 11, 1972, the re-hearing was denied on June 29, 1972.

Finally, on July 2, 1973, the United States Court of Appeals for the Sixth District reversed. (Its Order is appendixed herein.)

(It is noteworthy that the Detroit Federation of Teachers, the bargaining agent for the teachers of the School District of Detroit, was granted intervention early in this matter, and without the difficulty experienced by the Professional Personnel).

REASONS FOR GRANTING THE WRIT

Professional Personnel of Van Dyke agrees with Reason 1 (of Petition of Grosse Pointe School System—p.8).

The Decisions Below are in Direct and IRRECONCILIABLE CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL, AS WELL AS DECISION OF THE UNITED STATES SUPREME COURT; and Reason 2 (p. 14).

THE DECISIONS BELOW INVOLVE ISSUES OF IMMENSE PUBLIC IMPORTANCE OF (A) THE FAR-REACHING PRECEDENT ESTABLISHED THEREBY, AND (B) THE IMPACT OF THE LOWER COURTS' PROPOSED REMEDY UPON THE RESIDENTS OF EVERY SCHOOL DISTRICT IN THE DETROIT METROPOLITAN AREA. It is in agreement with Reason 3, p. 17) as well, but would re-state such reason to be more specifically applicable to this briefant, an organization of teachers, as follows:

> THE REFUSAL OF THE LOWER COURTS TO ACCORD FUNDAMENTAL DUE PROCESS OF LAW TO THE PROFESSIONAL PERSONNEL OF VAN DYKE, WHO, IT IS NOW CONCEDED, SHOULD HAVE BEEN GRANTED THE RIGHT TO INTERVENE (AS OF FEBRUARY 22, 1972) REQUIRES THE EXERCISE OF THIS COURT OF ITS SUPERVISORY POWERS.

Professional Personnel of Van Dyke was singularly unsuccessful, on the trial level, in its attempts to intervene. Its original petition was filed on February 22, 1972 (prior to the adoption by the trial court of the so-called Metropolitan Plan.) It was denied on March 15, 1972. Its petition for re-hearing, filed on April 11, 1972, was denied on June 14, 1972, after the passage of two very critical months in the proceedings. And this in spite of the fact that the law was clear that its motion to intervene should have been granted. [*Oliver* v *School District of Kalamazoo,* 448 F 2d 635 (CA 6, 1971) and *Smuck* v *Hobson,* 408 F 2d 175 (Dist of Col District, 1969)].

Assuming a Metropolitan Plan, the issues to be determined by the trial court are overwhelming: Teacher placement, tenure, grievance, salaries and advancements; curricula and class size are but a few of them.

The original input in an attempt to solve these problems is to be made by a court-appointed panel, consisting of two members of the defendant, State Board of Education, three members of the defendant, Detroit Board of Education, one from the plaintiff, one from defendant intervenors, Magdowski (who favor a Metropolitan Plan and who are essentially white home owners residing in the City of Detroit,) one from *all* the intervening school districts and one from the Michigan Civil Rights Commission (Joint Appendix 99a).

It is at once noteworthy that no one from *any* teacher organization is included. Yet without any teacher participation, this panel is mandated to re-assign faculty and staff, and to develop criteria "in the hiring, assignment, promotion, demotion and dismissal of faculty and staff . . . " (Joint Appendix 103a). And the Court of Appeals expressly held that such panel should proceed with its studies and plans (Joint Appendix 178a).

It is respectfully submitted that such panel—totally without a representative of any teacher organization or of any teachers—is violative of elementary due process and, indeed, contrary to the statutes of the State of Michigan (M.C.L.A. 423.211) recognizing collective bargaining right of public employees. It is further submitted that such panel has been given the power to completely obliterate the contractual rights of members of the Professional Personnel of Van Dyke.

The grant of the Petition to Intervene, as ordered by the Sixth Circuit Court of Appeals, is rendered totally meaningless if Professional Personnel is foreclosed from full and active participation in open court as well as this most important planning panel.

In its appellate brief on the denial of its Petition to Intervene, Professional Personnel wrote:

> Once an order is entered herein that affects the Van Dyke School District, the movant appellant will be practically foreclosed from litigating its rights in any form. Its members may be laid off, transferred, have their salaries reduced, their contractual rights decimated, have their tenure lost, without any day in court.

In reversing the trial court and ordering intervention, the Court of Appeals must have agreed with such thinking. Yet, under the terms of the Judgment of the Sixth Circuit Court of Appeals, Professional Personnel will be sent back to the trial court with naught but a hollow "right to intervene." It will not have a day in court-unless, the Supreme Court grants the writs of certiorari requested.

CONCLUSION

Wherefore, Professional Personnel of Van Dyke respectfully submit that the Writs of Certiorari requested issue.

Respectfully submitted,

ROSS, BRUFF and HENRIKSEN
By: William Ross
Attorneys for Professional Personnel of Van Dyke
215 S. Gratiot
Mt. Clemens, Michigan
962-6281

APPENDIX

M.C.L.A. 423.211 Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to this employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed July 2, 1973)

In re Appeal of
Professional Personnel of Van Dyke,
Appellants.

Ronald Bradley, et al.

v.

William G. Milliken, et al.

No. 72-2008

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This is an appeal by Professional Personnel of Van Dyke, which is the exclusive bargaining agent for the teaching personnel of the Van Dyke School District. Appellants undertook to intervene in the District Court in the case of *Bradley v. Milliken*. On March 15, 1972, the District Court denied the motion of appellants to intervene. On April 11, 1972, appellants filed a petition for rehearing of their motion to intervene. On June 29, 1972, the District Court affirmed its previous denial of the motion.

Upon consideration, it is Ordered that the decision of the District Court denying to appellants the right to intervene is vacated and the case is remanded to the District Court with directions to grant the motion to intervene.

Entered by order of the court.

/s/ James A. Higgins,
Clerk